Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Tenth Circuit's standard resolving doubts in favor of water districts in determining territory protected by 7 U.S.C. § 1926(b) inconsistent with federal law requiring strict interpretation of statutes providing protection from competition?

2. Has the Petitioner violated 7 U.S.C. § 1926(b) by continuing to provide water service to customers that were initially connected and provided with water service by the Petitioner prior to the funding date of the federal loan upon which the Respondent bases its Section 1926(b) protection?

3. May the Respondent recover under 42 U.S.C. § 1983 for the Petitioner's alleged violations of 7 U.S.C. § 1926(b), if the federal loan upon which the claim is based was satisfied by the Respondent prior to the Respondent's assertion of any claim of violation of Section 1926(b)?

PARTIES TO THE PROCEEDING

Petitioners

Town of Muldrow and the Muldrow Public Works Authority. The Muldrow Public Works Authority is a public trust, of which the Town of Muldrow is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "Town of Muldrow," and "Muldrow" are intended to encompass both Petitioners.

Respondent

Sequoyah County Rural Water District No. 7. Referred to herein as "Sequoyah."

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 191 F.3d 1192 (10th Cir. 1999). A copy of the Opinion is included in Appendix A, at page 1a. The Court of Appeals' order denying rehearing is unpublished, but is included in Appendix D, at page 55a. The Order and Judgment by the United States District Court for the Eastern District of Oklahoma are unpublished, but are included in Appendix B, at page 33a, and in Appendix C, at page 53a, respectively.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Opinion on August 17, 1999. [Appendix A.] On August 31, 1999, Petitioners filed a timely Combined Petition for Rehearing and Petition for Rehearing *En Banc* ("Combined Petition"). The United States Court of Appeals for the Tenth Circuit denied the Combined Petition on September 28, 1999. [Appendix D.] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Combined Petition. The Court's jurisdiction is sought under 28 U.S.C. §§ 1254(1), 2101(c), and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I § 8, cl. 1
The Spending Clause

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the

United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

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7 U.S.C. § 1926. Water and waste facility loans and grants.[1]

. . .

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

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[1] The full text of 7 U.S.C. § 1926 is set forth in Appendix E.

STATEMENT OF THE CASE

With this action, Sequoyah has claimed an exclusive right to serve water to commercial, industrial, and heavy residential areas in and around the Town of Muldrow, Oklahoma. With its claimed exclusive right, Sequoyah seeks to prevent Muldrow from serving the customers in these areas. The Town of Muldrow initiated water service to the customers in the disputed areas well before the action was initiated. In fact, Muldrow has provided water service to some of the disputed customers for many years prior to the funding of Sequoyah's current federal loan that serves as the basis of its claimed protection. Sequoyah has never provided water service to the disputed customers. [Appendix B, at p. 48a.]

Sequoyah bases its claims on 7 U.S.C. § 1926(b). Section 1926(b) provides anticompetitive protection – a safe harbor from antitrust liability – to public entities that accept federal loans for the construction of water distribution facilities in rural areas. Section 1926(b) prohibits the limitation or curtailment of water service that is provided or made available by the borrower. To fall within the prohibition, the limitation or curtailment must be accomplished through "inclusion of the area served ... within the boundaries of any municipal corporation or other public body, or by the granting of any franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b).

Over the years, Sequoyah and its predecessors have received four federal loans. In this case, Sequoyah has based its claimed Section 1926(b) protection on all four loans. Three of the four federal loans were originated long before this controversy arose – in 1969, 1970, and 1981. [Appendix

A, at p. 4a.] Those three loans were "satisfied in full" by Sequoyah in 1989, again long before this controversy arose. [Appendix A, at p. 4a; Appendix B, at p. 43a.] From 1989 through the funding date of its current loan, September 28, 1994, Sequoyah was not indebted to the federal government. [Appendix A, at p. 4a; Appendix B, at p. 45a.]

When the current federal loan was funded on September 28, 1994, Muldrow was already serving water to a number of the water customers that are at issue in this dispute. [Appendix A, at p. 5a.] In fact, two of the disputed water customers began receiving water service from Muldrow during the term of the three earlier loans that were satisfied in 1989. [*Id.*]

On October 14, 1997, Sequoyah filed a complaint seeking an injunction and a declaratory judgment preventing Muldrow from continuing to serve water to the disputed customers. Sequoyah also sought damages under 42 U.S.C. § 1983, based on its claim that Muldrow's water sales dating back to 1989 and earlier were in violation of Section 1926(b). Finally, in its Complaint, Sequoyah requested a constructive trust to be imposed on water lines owned and operated by Muldrow, again based on its claim that Muldrow's water sales to the disputed customers violated Section 1926(b).[2]

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 1337 because the case presented a federal question arising under 7 U.S.C. § 1926(b) and 42 U.S.C. § 1983. Both Sequoyah and Muldrow filed motions

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[2] Sequoyah also alleged federal antitrust claims and various state-law claims, all of which were dismissed by stipulation, and were not at issue before the Court of Appeals. [Appendix A, at p. 6a.]

for partial summary judgment under Rule 56(d) of the Federal Rules of Civil Procedure. The claims that were omitted from Muldrow's Rule 56(d) motion were dismissed by stipulation prior to the District Court's ruling on the competing Rule 56 motions. [Appendix B, at p. 34a.]

On June 12, 1998, the District Court granted summary judgment in favor of Muldrow based on undisputed facts establishing that Sequoyah had failed to "make service available" to the disputed water customers. [Appendix B, at p. 52a.] In the course of its Order, the District Court held that Sequoyah's Section 1926(b) protection resulting from the three original federal loans was extinguished when the loans were satisfied, and that "no action taken by Muldrow prior to that time is actionable." [Appendix B, at p. 45a.] The District Court entered judgment on June 12, 1998. [Appendix C.]

Sequoyah filed an appeal with the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit reversed the District Court's Rule 56 summary judgment, finding material issues of fact on the issue of whether Sequoyah had "made service available" to the disputed water customers.

In its instructions to the District Court on remand, the Tenth Circuit resolved several issues in favor of Sequoyah. These issues are the subject of this Petition. First, the Tenth Circuit reversed the District Court's determination that Section 1926(b) protection is extinguished when the claimant's federal loan is satisfied. The Tenth Circuit held that "even if a water association has repurchased its loan and discharged its debt to the government, encroachments which occurred during the term of the loan are protected." [Appendix A, at p. 18a.]

Second, the Tenth Circuit held that water sales by Muldrow during the term of Sequoyah's current federal loan are actionable even if Muldrow first initiated water service to the disputed customer prior to the funding of Sequoyah's current federal loan. According to the Tenth Circuit, Sequoyah "may recover for encroachments occurring *or continuing* after ... the date on which it obtained [its current] loan from the FmHA, so long as it establishes that it made service available to those customers." [Appendix A, at p. 31a.]

Finally, the Tenth Circuit announced a liberal standard of statutory construction for Section 1926(b). "Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." [Appendix A, at 9a.]

ARGUMENT FOR GRANTING WRIT

The Court should grant certiorari in this case because the Tenth Circuit has announced a new liberal-interpretation standard for 7 U.S.C. § 1926(b). Section 1926(b) is an anticompetitive statute – a safe harbor from federal antitrust scrutiny. Section 1926(b) must be viewed as an exemption from federal antitrust liability, allowing rural water associations to establish and maintain monopolies that otherwise would be prohibited. The Tenth Circuit's liberal-interpretation standard is contrary to long-standing federal law requiring that exemptions from federal antitrust liability be construed narrowly. The new standard is also contrary to principles for interpretation of Section 1926(b) announced by the Sixth and Seventh Circuits. *See Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 (6th Cir. 1996); *CSL*

Utils., Inc. v. Jennings Water, Inc., 16 F.3d 130, 137 (7th Cir. 1993), *cert. denied*, 513 U.S. 812 (1994).

In applying its new liberal-interpretation standard to Section 1926(b), the Tenth Circuit has exceeded the scope of the text of the statute, and the congressional power behind the statute. The Tenth Circuit has used Section 1926(b) to impose liability on Muldrow for water sales to customers that were connected to Muldrow's water distribution system prior to the date of the federal loan that serves as the basis for Section 1926(b) protection. This application of Section 1926(b) is contrary to the express terms of the statute, which prohibit only "curtailment" and "limitation" of water service that is provided or made available by the protected water association "during the term of [the] loan." 7 U.S.C. § 1926(b).

Furthermore, with this retrospective application of Section 1926(b), the Tenth Circuit has pushed Section 1926(b) beyond the scope of the Spending Clause, which provides the congressional authority for the statute's enactment. States are provided with insufficient notice that acceptance of federal loans under this statute will result in a reshuffling of existing water providers. Under the Tenth Circuit's view of Section 1926(b), the simple occurrence of the funding of a federal loan can operate to divest a municipality of its investment in infrastructure, and oust the municipality from active provision of water services to existing customers.

Finally, the Tenth Circuit has opened the door to damage awards against municipalities for water sales that occurred during federal loans that have long since been retired by the protected water association. In such instances, there is no need for injunctive or declaratory relief because

the federal loan is satisfied. By allowing such an action, the Tenth Circuit has found a remedy where there is no right.

With this case, the delicate structure of federalism hangs in the balance. If the Tenth Circuit's decision is allowed to stand, rural water associations will be allowed to derail industrial development and impose retrospective liability on well-intentioned, development-minded municipalities, using a federal statute as their sword. These gross actions by rural water associations will be enabled by a federal statute that was never intended to impede development in rural areas.

ARGUMENT 1

The Tenth Circuit's newly-announced liberal interpretation of Section 1926(b) is inconsistent with federal law on the construction of federal statutes that restrain competition.

While some federal courts have applied a liberal-interpretation standard to 7 U.S.C. § 1926(b), no federal court has gone quite so far as the Tenth Circuit. In *Muldrow*, the Tenth Circuit held that "[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." [Appendix A, at p. 9a.] This liberal standard is unsupported by existing federal case law. More importantly, the broad standard is inconsistent with longstanding federal law on the construction of federal statutes that restrain competition.

Section 1926(b) must be viewed as an exemption from federal antitrust liability, allowing rural water associations to establish monopolies that otherwise would be prohibited by

federal antitrust laws. The Tenth Circuit recognized that Congress intended with Section 1926(b) "to protect rural water districts from competition in order to encourage rural water development." [Appendix A, at p. 8a (quoting *Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81, 88 (Colo. 1995).] This type of anticompetitive protection is directly contrary to the fundamental national economic policy that is embodied in federal antitrust laws. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973).

As an exemption from federal antitrust liability, Section 1926(b) must be construed narrowly. The Court has long held that exemptions to antitrust laws are to be construed narrowly. *Jefferson County Pharmaceutical Assn. v. Abbott Labs.*, 460 U.S. 150, 159, *reh'g denied*, 460 U.S. 1105 (1983); *Abbott Labs. v. Portland Retail Druggists Assn.*, 425 U.S. 1, 11-12 (1976); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-47, *reh'g denied*, 396 U.S. 871 (1969); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956) (Warren, C.J.).

In *McKesson & Robbins*, the Court rejected arguments for a broad construction of the Miller-Tydings and McGuire Acts, which authorized price-fixing agreements under limited circumstances. *McKesson & Robbins*, 351 U.S. at 310-11, 316. The base-line rule – that price-fixing agreements are illegal per se – was established by the Sherman Act. *Id.* at 310. The *McKesson & Robbins* Court properly construed the Sherman Act broadly, and its exemptions narrowly.

Similarly, in *Portland Retail Druggists Association*, the Court held that in enacting the exemption provision of the Nonprofit Institutions Act, the Congress "surely did not intend to give the hospital a blank check." *Portland Retail*

Druggists Assn., 425 U.S. at 13. "We therefore conclude that the exemption provision of the Nonprofit Institutions Act is a limited one; that just because it is a nonprofit hospital that is purchasing pharmaceutical products does not mean that all its purchases are exempt from Robinson-Patman ...." *Id.* at 14.

In *Seatrain Lines*, the Court narrowly construed a provision of Section 15 of the Shipping Act, which provided an antitrust exemption for certain agreements filed with the *Federal Maritime Commission*. *Seatrain Lines*, 411 U.S. at 726-28, 733. The Court rejected a broad reading of the statute because it

> would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed, and that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."

Seatrain Lines, 411 U.S. at 733 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963)) (citations omitted). In *Philadelphia National Bank*, the Court rejected an argument that the Bank Merger Act, by requiring bank regulatory agencies to consider competitive factors when approving mergers, "immunized approved mergers from challenge under the federal antitrust laws." *Philadelphia Nat'l Bank*, 374 U.S. at 350.

The federal courts applying Section 1926(b) protection cannot ignore this strict view of interpretation of anticompetitive federal statutes. In fact, several circuits have

construed Section 1926(b) in a limited manner. In 1993, the Seventh Circuit placed limits on the scope of Section 1926(b), even while recognizing the prevailing trend that "federal courts construing the statute have ... interpreted it liberally to protect FmHA-indebted rural water associations." *CSL Utils., Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 137 (7th Cir. 1993), *cert. denied*, 513 U.S. 812 (1994). Despite the prevailing trend, the Seventh Circuit found limits on the scope of Section 1926(b) protection:

> This is not to say, however, that a government loan to a rural water association can totally freeze retail water utility development within the indebted association's service area. Some development is permissible even though the granting of a franchise or the inclusion of the service area within municipal boundaries are precluded.

CSL Utils., Inc., 16 F.3d at 137; *see also Rural Water Sys. No. 1 v. Sioux Center*, 967 F. Supp. 1483, 1520 (N.D. Iowa 1997) ("The purpose of § 1926(b) is not to protect a rural water association at all costs ....").

The applicability of the strict standard of construction for anticompetitive statutes is enhanced by an examination of the source of the current trend of liberal interpretation of Section 1926(b). Despite sweeping statements by the Fifth and Seventh Circuits, the liberal-interpretation standard applied to Section 1926(b) can be traced to only a handful of decisions.

In its *Muldrow* decision, the Tenth Circuit relies on decisions from the Fifth and Seventh Circuits in support of its announcement that "[d]oubts ... should be resolved in favor

of the FmHA-indebted party seeking protection for its territory." [Appendix A, at p. 9a (citing *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996), and *Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989) (hereinafter *Jennings Water II*).] Neither of the cited decisions expressly supports the standard announced by the Tenth Circuit. Furthermore, the liberal-interpretation standard is not as deeply rooted as proclaimed by the Fifth Circuit in *North Alamo*. In fact, the liberal-interpretation standard finds its source in a misstatement of authority by the Seventh Circuit in *Jennings Water II*.

In *North Alamo*, the Fifth Circuit announced: "Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment." *North Alamo*, 90 F.3d at 913. However, the *North Alamo* court finds this conclusion in the Seventh Circuit's decision in *Jennings Water II*.[3] In *Jennings Water II*, the Seventh Circuit proclaims broadly that "[a]ll five federal courts that have reviewed section 1926(b) have concluded that the provision should be given a liberal interpretation that protects rural water associations indebted to the FmHA from municipal encroachment." *Jennings Water II*, 895 F.2d at 315. A review of the authorities cited by the *Jennings Water II* court reveal that this pronouncement by the Seventh Circuit is misleading, and should not serve as support for the liberal-construction standard applied by the Tenth Circuit.

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[3] The *Jennings Water* decision was also the source of a similar statement by the Sixth Circuit in *Wayne v. Sebring*, 36 F.3d 517, 527-28 (6th Cir. 1994), *cert. denied*, 514 U.S. 1127 (1995).

First, the *Jennings Water II* court cites *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The *Madison* court does not use the terms "broad application" or "liberal interpretation." Instead, the *Madison* court appears to be the source of the "congressional mandate" phrase that appears in many decisions interpreting Section 1926(b):

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b).

Madison, 816 F.2d at 1059. A clear mandate and unambiguous statutory terms do not, however, equate with a liberal-interpretation standard.

The *Jennings Water II* court then cites *Moore Bayou Water Assn. v. Jonestown*, 628 F. Supp. 1367, 1369-70 (M.D. Miss. 1986), and argues that the *Moore Bayou* court construed Section 1926(b) as broad and absolute. The *Moore Bayou* court's decision, however, does not use the terms "broad" or "absolute." The *Moore Bayou* court found no ambiguity in the meaning of the statute, and determined that

its application would not lead to absurdity. "The section clearly prohibits *any* curtailment or limitation of the service provided by a rural water association resulting from the inclusion of all or a part of its territory within a municipality while the association is indebted to the FmHA." *Moore Bayou*, 628 F. Supp. at 1369-70 (emphasis in original).

The source of the liberal-interpretation standard can be found only through an examination of the *Jennings Water II* court's citation of *Glenpool Util. Auth. v. Creek County Rural Water Dist.*, 861 F.2d 1211 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989). There, the Tenth Circuit cites and quotes the district court decision that is under review by the *Jennings Water II* court. In 1988, the U.S. District Court for the Southern District of Indiana held that "[t]he clear message of the three federal cases applying 7 U.S.C. § 1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically by annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems." *Jennings Water, Inc. v. North Vernon*, 682 F. Supp. 421 (S.D. Ind. 1988) (hereinafter *Jennings Water I*), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

The source, therefore, of the liberal-interpretation standard is a district court decision from 1988. Without considering the longstanding principal of strict interpretation for antitrust exemptions, the district court in *Jennings Water I* determined that the statute should be construed broadly to prevent municipalities from finding loopholes in the statute's coverage. In doing so, however, the *Jennings Water I* court opened the floodgates for subsequent federal courts to impose liability on municipalities far beyond the level expressly contemplated by the Congress that drafted Section 1926(b).

This Court should grant certiorari in order to unravel the tangled web on which the liberal-interpretation standard of Section 1926(b) is based. The strict-interpretation standard for antitrust exemptions must be applied to Section 1926(b) in order to prevent undue judicial impediments on competition.

ARGUMENT 2

The Tenth Circuit has stretched Section 1926(b) beyond its text and the intent of Congress by imposing liability on Muldrow for water sales that began prior to the water district's current federal loan.

By applying a broad brush to its interpretation of Section 1926(b), the Tenth Circuit has stretched the statute beyond its text, beyond its purpose, and beyond the intent of Congress.

With the more limited interpretation of Section 1926(b) applied by the *CSL Utilities* court, discussed *infra*, it is clear that Muldrow would have received a different result had this case been decided in the Seventh Circuit. The *CSL Utilities* court held that Section 1926(b) "prohibit[s] another supplier (whether public or private) from *being substituted for, and from displacing*, the service of the rural water association.... The cases and fragments of legislative history available to us all seem to have in mind curtailment resulting from *substitution* of some third party as a water-supplier for [the disputed customer]." *CSL Utils., Inc.*, 16 F.3d at 135 (emphasis added).

Based on this narrow interpretation of Section 1926(b), applied by the *CSL Utilities* court, Muldrow would have been allowed to continue its water sales to existing water customers. The *CSL Utilities* court recognized that it is the

displacing or supplanting of a rural water association that runs afoul of Section 1926(b). If the displacement occurs prior to the federal indebtedness, there can be no Section 1926(b) violation for continued water sales to the municipality's existing water customer. *CSL Utils., Inc.*, 16 F.3d at 133 (holding that the restriction on private franchises found in Section 1926(b) is contingent upon a finding that the private franchise "was granted during the term of the FmHA loan"). On this critical point, the Tenth Circuit's decision is in conflict with the decision of the Seventh Circuit in *CSL Utilities*.

On this same critical point, the Tenth Circuit's decision conflicts with the Sixth Circuit's decision in *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 (6th Cir. 1996). The *Lexington-South Elkhorn* court correctly recognized that a rural water association claiming Section 1926(b) protection must "make service available" "prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection." *Lexington-South Elkhorn*, 93 F.3d at 234.[4] The logical extension of this rule is that a municipality may avoid Section 1926(b) liability if it commences water service before the elements of Section 1926(b) are met – before the rural water association (1) makes service available or (2) becomes indebted to the federal government.

Despite the absence of a federal loan during the period from May 5, 1989 through September 28, 1994, the Tenth Circuit applied Section 1926(b) to Muldrow's initiation of water service during that period. [Appendix A, at p. 19a.] Ignoring the clear rule of the Seventh Circuit in *CSL Utilities*,

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[4] The Tenth Circuit recited the *Lexington-South Elkhorn* rule, [Appendix A, at pp. 21a-22a], but failed to apply it.

and the Sixth Circuit in *Lexington-South Elkhorn*, the Tenth Circuit held:

> [A]lthough Plaintiff cannot seek relief for encroachments occurring between May 5, 1989, and September 28, 1994, because it was not indebted to the FmHA during that period, we still must examine whether Plaintiff has established genuine issues of material fact concerning whether it made service available to the customers which Defendants began serving during that period. We undertake this inquiry for purposes of determining whether Plaintiff may seek relief for encroachments which continued beyond the date of the 1994 loan.

[Appendix A, at pp. 19a-20a.]

This retrospective application of Section 1926(b) scrutiny is contrary to the express terms of the statute. Section 1926(b) provides as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the

> association at the time of the occurrence of such event.

7 U.S.C. § 1926(b).

The operative terms in Section 1926(b) are "curtailed or limited." It is these actions that are prohibited by the statute. The terms are active verbs, and are roughly synonymous. The term "limit" is defined as "to curtail or reduce in quantity or extent." *Webster's Third New International Dictionary* 1312 (1976 ed.). The term "curtail" is defined as to "reduce in area or amount," or "to diminish." *Id.* at 558.

The statute then uses the terms "inclusion ... within," and "the granting of" to further define the actions that are proscribed by Section 1926(b). Again, the drafters of the statute used active verbs to define the conduct that is prohibited. The term "inclusion" is defined as "*the act of* including." *Webster's Third New International Dictionary* 1143 (1976 ed.) (emphasis added). In turn, the verb "to include" means "to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle." *Id.* The term "granting," or "to grant," means "GIVE, BESTOW, CONFER ... to make a conveyance of: give the possession or title of *esp.* by a deed or formal writing." *Id.* at 989.

The federal courts that have interpreted Section 1926(b) have summarized these proscribed actions with the term "encroachment." *See, e.g., North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir. 1996) (using the term "encroachment"), *cert. denied*, 519 U.S. 1029 (1996). The term "encroachment" is defined as "the act or action of encroaching." *Webster's Third New International*

Dictionary 747 (1976 ed.). The verb "to encroach" is then defined to mean "to enter by gradual steps or by stealth into the possessions or rights of another: TRESPASS, INTRUDE." *Id.*

Each of these terms encompasses an active violation of Section 1926(b), rather than a passive violation. For example, the Fifth Circuit has equated "encroachment" with "competing franchises, new or additional permit requirements, or similar means." *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The *Madison* court read Section 1926(b) expansively to also prohibit a condemnation action by a municipality. *Id.* The difference between the condemnation action contemplated by the *Madison* court and the preexisting water service in the case before this Court is that a condemnation action is a positive action taken by a competitor, seeking to take existing customers and revenue from the protected rural water association. In a similar view of the active component of the conduct prohibited by Section 1926(b), the Seventh Circuit viewed the term "encroachment" as the *expansion* of water sales "to consumers located within the rural water association's territory." *Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989).

To run afoul of Section 1926(b), a municipality must actively compete for the disputed water customer, by moving into the disputed territory through *inclusion* of the territory within its corporate boundaries. Furthermore, Section 1926(b) requires that the prohibited actions occur "during the term of such loan." 7 U.S.C. § 1926(b). If the active competition or encroachment by the municipality occurs when there is no federal loan, then there is no Section 1926(b) violation.

It is in this sense that the Tenth Circuit improperly applied Section 1926(b). At least with regard to five disputed properties that were first served between May 5, 1989 and September 28, 1994, [Appendix A, at p. 5a], the active encroachment by Muldrow occurred when Sequoyah had no federal indebtedness. With regard to those five properties, the only thing that occurred after Sequoyah borrowed federal funds on September 28, 1994 is continued water sales by Muldrow to its existing customers.

Entirely absent from the clear and express terms of Section 1926(b) is a prohibition on the *continuation* of water sales by a municipality to an existing water customer. Also absent from the terms of Section 1926(b) is any indication that Congress intended for Section 1926(b) protection to be used to prevent a municipality from continuing water sales to an existing customer. Nowhere in the text of Section 1926(b) does Congress explain that a municipality may lose control of its infrastructure – its capital expenditures – simply because a federal loan has been extended to a neighboring rural water association.

Looking beyond the express terms of the statute,[5] Section 1926(b) must be interpreted consistently with the

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[5] To the extent that Section 1926(b) is ambiguous in its terms, it should not be interpreted to limit fundamental state legislative prerogatives, such as the provision of water service by municipalities. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991). Such prerogatives, through which "a State defines itself as a sovereign," are "powers with which Congress does not readily interfere." *Id.* at 460, 461. "Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.* at 460.

federal power on which it is based. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 15 (1981) ("In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate ...."). In this case, the retrospective imposition of Section 1926(b) liability on municipalities for the continuation of water service to existing water customers is inconsistent with the federal Spending Clause power.[6]

In fact, the Tenth Circuit's application of Section 1926(b) – if it were consistent with congressional intent – is precisely the type of misapplication of the Spending Clause power that "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traiditional concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., dissenting).

Importantly, it is the application of Section 1926(b) by the Tenth Circuit, in direct contradiction of the clear and express terms of the statute, that runs afoul of the limits of Spending Clause power. The prevention of active

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[6] In 1988, the Tenth Circuit held that Section 1926(b) "is most appropriately viewed as a congressional enactment resting upon Congress' powers under the spending clause of the United States Constitution." *Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215 (10th Cir. 1988) (footnote omitted), *cert. denied*, 490 U.S. 1067 (1989). No federal court has held otherwise, *see Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1061 (5th Cir. 1987), and the Petitioners respectfully agree with the *Glenpool* court, that spending power analysis is appropriate for Section 1926(b).

encroachment on water service "made available" by a federally-indebted rural water association arguably may fall within the congressional spending power. However, the framers could never have intended the Spending Clause to authorize Congress to forcibly remove a municipality from active water service to an existing customer – a customer first served when there was no federal loan. That is what the Tenth Circuit has done with its retrospective application of Section 1926(b).

This broad application of Section 1926(b) is rendered more damaging to the balance of the federal system by the fact that a private right of action has been attached to violations of Section 1926(b). "[D]efining the scope of the private cause of action in general, and the damages remedy in particular, 'inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken.'" *Davis*, 526 U.S. 629, 119 S. Ct. at 1677-78 (Kennedy, J., dissenting) (quoting *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 284 (1998)). "[T]his element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds." *Id.* at 1678 (Kennedy, J., dissenting).

The "clear notice" requirement is not met in this case. First, in enacting Section 1926(b), Congress failed to express clearly an intent to impose a restriction on competition of the magnitude contemplated by the Tenth Circuit. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). This is the type of "massive obligation" that "defies common sense." *Id.* As demonstrated above, the clear and express terms of the statute militate against the retrospective application adopted by the Tenth Circuit. Application of

Section 1926(b) to existing water customers is precisely the type of "post acceptance or 'retroactive' conditio[n]" that the Court rejected in *Pennhurst. Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). The Tenth Circuit has expanded the anticompetitive protection of Section 1926(b) from a preventative statute – restraining expansion of municipal water systems – to a coercive statute, forcing a municipal water system to give up existing customers and the attendant capital expenditures.

Second, the State of Oklahoma never had an opportunity to choose not to accept the funds that were borrowed by Sequoyah in 1994. Congress failed to state the conditions that the Tenth Circuit found in Section 1926(b) with sufficient clarity. The State's potential obligations under Section 1926(b) are largely indeterminate, *see Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981), particularly in view of the retrospective application adopted by the Tenth Circuit. Acceptance of the funds under the conditions imposed by the Tenth Circuit would allow Sequoyah to oust Muldrow as water-service provider to customers that are already adequately served by Muldrow. [Appendix A, at p. 7a.] Because this eventuality was not clear from the text of Section 1926(b), the State was unable to make an informed choice regarding whether to accept the benefits of the federal loans contemplated by Section 1926. Given such an opportunity, the State would certainly have elected not to accept the funds.

Furthermore, in determining the scope of Section 1926(b), the Court must consider the ongoing nature of the federal loans extended under 7 U.S.C. § 1926. Once the federal loans are funded, the states lack the ready ability to unravel the resulting obligations. Even if state legislatures were to remove water associations' power to borrow from the

federal government,[7] existing federal loans would remain outstanding for indeterminable periods.[8] "Remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance." *Guardians Assn. v. Civil Serv. Comm'n*, 463 U.S. 582, 597 (1983) (White, J., separate opinion).

As a final indication of the absence of congressional intent supporting the Tenth Circuit's broad interpretation of Section 1926(b), the imposition of Section 1926(b) liability under these circumstances would offend constitutional due process. In drafting 1926(b), Congress must have understood the statute to have conformed with the requirements of due process. In this case, the Tenth Circuit's application of Section 1926(b) has effected an unconstitutional taking of infrastructure and capital investment – and the rights to serve specific customers – owned by Muldrow.

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[7] *See Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215-16 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

[8] In an effort to remedy the imbalance created by the Tenth Circuit's broad application of Section 1926(b), state legislatures may be tempted to dismantle the statutes creating rural water associations. This result certainly would be inconsistent with the stated purpose of Section 1926(b), which is to "serve as protection of federal funds advanced under the congressional spending power and pursuant to a national policy concerned with water management and rural populations." *Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

When Muldrow initiated water service to five disputed water customers between May 5, 1989 and September 28, 1994,[9] there was no federal protection to prevent Muldrow from doing so.[10] In the absence of federal protection, the territory established by Sequoyah was nothing more than an artificial boundary prescribing the extent of Sequoyah's right to serve water. During this five-year period, Muldrow invested capital expenditures and constructed the infrastructure necessary to provide water service to these five disputed water customers.

On September 28, 1994, after Muldrow had completed these investments and initiated water service to the five disputed water customers, Sequoyah retreated to its offices and, without notice to Muldrow, borrowed funds from the federal government. Under the Tenth Circuit's view of Section 1926(b) protection, this simple act by Sequoyah of borrowing federal funds on September 28, 1994 was sufficient to divest Muldrow of the right to use its infrastructure and capital investment to continue water sales to the five disputed water customers.

By applying Section 1926(b) in this manner, the Tenth Circuit has appropriated the property of Muldrow without "just compensation." The Fifth Amendment protects the property of states from appropriation by the federal government without just compensation. *See United States v. Carmack*, 329 U.S. 230, 242 (1946), *reh'g denied*, 329 U.S. 834 (1947); *California v. United States*, 395 F.2d 261, 263 & n.4 (9th Cir. 1968). "This is true even when the property has

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9 [Appendix A, at p. 5a.]

10 [Appendix A, at p. 19a.]

been dedicated by the State to public use." *California*, 395 F.2d at 264 & n.5.

When viewed in light of the requirements of Due Process, the Tenth Circuit's broad interpretation of Section 1926(b) is inconsistent with the clear terms of the statute. Had Congress intended to effect a "taking" of municipally-owned water-service infrastructure as part of the funding of federal loans to rural water associations, it would have included a provision to compensate the municipality that is forced to give up its infrastructure. In the absence of such an expressed congressional intent, the Court can only conclude that the drafters of Section 1926(b) did not intend to supplant municipalities as water service providers under such circumstances.

Regardless of the source of congressional intent – the text of the statute, the limits of the spending power, or the constraints of due process – the Tenth Circuit's expansive interpretation of Section 1926(b) exceeded the statute's intended scope. In this case, the delicate balance of federalism has been interrupted by the Tenth Circuit's overly broad application of Section 1926(b). For these reasons, the Court should grant certiorari to address the proper interpretation of 7 U.S.C. § 1926(b).

ARGUMENT 3

By allowing Sequoyah's action against Muldrow for water sales occurring during a now-satisfied federal loan, the Tenth Circuit has approved compensatory damages in the absence of private rights secured by federal law.

In announcing its August 17, 1999 decision, the Tenth Circuit avoided an express determination of the remedies that might be available to Sequoyah for Muldrow's alleged misconduct. But by reversing the District Court on one critical issue, the Tenth Circuit cleared the way for compensatory damages against Muldrow, in the absence of a corresponding private right secured by federal law. As a result, the Tenth Circuit approved a private right of action based on Section 1926(b), under circumstances that fail to meet the requirements of *Maine v. Thiboutot*, 448 U.S. 1 (1980).

The District Court held that when Sequoyah "paid off its debt to the FmHA on May 5, 1989, the protections enjoyed by [Sequoyah] under § 1926(b) were extinguished and *no action taken by Muldrow prior to that time is actionable.*" [Appendix B, at p. 45a (emphasis added).] In reaching this conclusion, the District Court implicitly recognized that injunctive and declaratory relief would be unavailable for past water sales.[11] It is tautological that pre-

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[11] While noting that "Section 1926(b) does not create or specify a remedy for the enforcement of violations," the U.S. Court of Appeals for the Fifth Circuit noted that "an injunction has been the principal tool employed by the courts with which to enforce the statute and prevent violations." *North Alamo Water Supply Corp.*

1989 water sales – initiated and completed long before the instant lawsuit was filed – cannot be the subject of an injunction or declaratory judgment.

The Tenth Circuit reversed the District Court's ruling on this issue, effectively clearing the way for an award of compensatory relief by the District Court, for water sales occurring during the term of the federal loan that was satisfied by Sequoyah in 1989.[12] This decision was in error because

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v. San Juan, 90 F.3d 910, 917 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996).

[12] Despite reversing the District Court's decision on this issue, the Tenth Circuit expressed uncertainty regarding whether compensatory damages should be available to remedy water sales that occurred during the prior loan period. In footnote 6 of its decision, the Tenth Circuit begs the question of whether municipal water sales are actionable under Section 1983, after the water district's federal loan is satisfied. [Appendix A, at p. 18a.] "[A]ssuming that Plaintiff meets the requirements for § 1926(b) protection and that relief is not barred by the statute of limitations, the [district] court [on remand] must determine *what remedy is appropriate* for Defendants' encroachments of Plaintiff's territory." [*Id.* (emphasis added).]

Of course, 42 U.S.C. § 1983 is remedial in nature. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979); *Miener v. Missouri*, 673 F.2d 969, 976 n.6 (8th Cir. 1982), *cert. denied*, 459 U.S. 909 (1982), *and cert. denied sub nom. Special School Dist. v. Miener ex rel. Miener*, 459 U.S. 916 (1982). Section 1983 merely ensures that an individual has a cause of action for constitutional violations, and authorizes a cause of action based on civil rights deprivations. *Chapman*, 441 U.S. at 617-18. "While *Thiboutot* makes explicit that a § 1983 cause of action extends to cover statutory violations, this ruling does not change the fact that § 1983 itself does not create substantive rights.

under these circumstances, Section 1926(b) does not secure rights in favor of Sequoyah.[13] *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

The interests supporting Section 1926(b) disappear when the protected debt is repaid. "When an issuer buys back its own bond and cancels the debt, ... it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to one of the main legislative purposes in enacting § 1926(b) – safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition *diminishes as its loans are repaid.*" *Scioto County Regional Water Dist. v. Scioto Water, Inc.*, 103 F.3d 38, 42 (6th Cir. 1996), *cert. denied*, 521 U.S. 1111 (1997).

The structure of Section 1926(b) militates against monetary awards against municipalities under these circumstances. A municipality's water sales to an existing water customer cannot be terminated at the demand of a competing rural water district, based simply on a fear of

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A § 1983 claim presumably must fail if the underlying statute does not create substantive rights." *Miener*, 673 F.2d at 976 n.6 (citing *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

[13] The absence of a right secured by federal law would also prevent Section 1983 damages for water sales during Sequoyah's current federal loan. With this Petition, Muldrow focuses its *Thiboutot* argument on pre-1989 water sales because the Tenth Circuit has expressly allowed Sequoyah's action to proceed regarding pre-1989 water sales despite the clear unavailability of any relief that might be awarded for such water sales outside the terms of *Thiboutot* and Section 1983.

Section 1926(b) litigation. A municipality that terminates water sales to an existing customer faces a broad range of potential liability theories that are likely to be asserted by the customer whose water service is terminated. Faced with potential liability to the customer if water service is terminated, the municipality has little choice but to continue water sales to the existing water customer. These water sales can hardly be viewed as the type of "intentional" misconduct that might be remedied with compensatory damages. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 1670 (observing that remedies are limited under Spending Clause statutes when alleged violation is unintentional). Perhaps more importantly, continuing water sales by a municipality to disputed water customers can only be viewed as consistent with the purpose of Section 1926(b).[14] Water sales that go unchallenged by the protected rural water association certainly cannot be viewed as inconsistent with Section 1926(b).

The purpose of Section 1926(b), and all remedies that might be based on the statute, is to protect the repayment of the FmHA loan owed by the rural water association. Once the rural water association has paid its FmHA loan, there would be no need *or basis* for an injunction preventing encroachment by a competing municipality. Similarly, there would be no need *or basis* for an award of damages based on

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[14] In applying *Pennhurst* to Section 1926(b), the Tenth Circuit observed that the conditions imposed by Section 1926(b) "serve as protection of federal funds advanced under the congressional spending power and pursuant to a national policy concerned with water management and rural populations." *Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

encroachment that may have occurred during the term of the now-satisfied federal loan.

With the satisfaction of the federal loan giving rise to Section 1926(b) scrutiny, there remain no rights to be secured in favor of Sequoyah. With no rights secured by the statute, there can be no private right of enforcement under 42 U.S.C. § 1983. For these reasons, the Tenth Circuit was in error in allowing a damages action to proceed against Muldrow for water sales that occurred over ten years ago.

CONCLUSION

It is only by granting certiorari in this case that the Court can put an end to litigation abuse based on 7 U.S.C. § 1926(b). By clarifying the standard for interpretation of this statute, and by explaining the remedies available under this statute, this Court can right the disturbed balance of federalism at its lowest level.

/s/_____
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APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed August 17, 1999]

No. 98-7090

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff- Appellant,

v.

TOWN OF MULDROW, an Oklahoma Town, and MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants - Appellees.

CITY OF BROKEN ARROW and OKLAHOMA MUNICIPAL LEAGUE, INC.,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of Oklahoma

Court of Appeals Opinion - 8/17/99

(D.C. No. 97-CV-578-S)

Before **PORFILIO, McKAY**, and **TACHA**, Circuit Judges.

McKAY, Circuit Judge.

Plaintiff-Appellant Sequoyah County Rural Water District No. 7 appeals the district court's entry of summary judgment in favor of Defendants-Appellees Town of Muldrow, Oklahoma, and Muldrow Public Works Authority, a public trust.[1] Plaintiff filed this action under 42 U.S.C. § 1983 claiming that, as a debtor of the Farmers Home Administration (FmHA),[2] it was entitled to the protection of 7 U.S.C. § 1926(b), namely, the exclusive right to provide water service within its service area. Plaintiff alleged that Defendants deprived it of its § 1926(b) rights by providing water service to certain customers within Plaintiff's service area. Plaintiff also sought declaratory and injunctive relief to prevent Defendants from selling or continuing to sell water

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[1] Two amicus curiae briefs were submitted in this matter, one on behalf of the City of Broken Arrow and one on behalf of the Oklahoma Municipal League, Inc. Although we have considered the arguments presented by the amici curiae in our disposition of the issues raised by the parties, we decline to address their additional arguments. See Tyler v. City of Manhattan, 118 F.3d 1400, 1404 (10th Cir. 1997) (explaining that court should use its discretion to address additional arguments raised by amici curiae only in exceptional circumstances).

[2] Although the FmHA is now known as the Rural Utilities Service, see 7 C.F.R. § 1780.3(a), to avoid confusion we will refer only to the FmHA in this opinion.

within its service area as well as damages for Defendants' past encroachments.[3]

I.

Plaintiff is a rural water district incorporated by the Board of County Commissioners of Sequoyah County, Oklahoma, to develop and provide water service to the rural residents within its territory. See OKLA. STAT. ANN. tit. 82, § 1324.3. Plaintiff was initially established in October 1966 as Sequoyah County Rural Water District No. 4. In 1969, Sequoyah-4 was dissolved and all of its assets and liabilities were assigned to an entity called the Rural Water Corporation (RWC). Finally, in March 1991, the Board of Commissioners transferred all of the assets and liabilities of RWC into Sequoyah County Rural Water District No. 7, which is Plaintiff's current name.

Oklahoma law authorizes rural water districts to borrow money from the federal government to accomplish the purposes for which they are established. See OKLA. STAT. ANN. tit. 82, § 1324.10.4. As part of the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921-2009n, Congress authorized the Secretary of Agriculture to make or insure loans to nonprofit water service associations for "the conservation, development, use, and control of water."

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[3] Plaintiff also sought a constructive trust to remedy Defendants' alleged encroachments, but Defendants claim that Plaintiff has waived this issue on appeal by failing to raise it in its opening brief. Regardless of whether Plaintiff has waived this issue on appeal, we leave the issue of what remedy is appropriate for the district court on remand.

7 U.S.C. § 1926(a). In accordance with these provisions, RWC began borrowing funds from the FmHA in 1969 to build water service facilities. RWC eventually became indebted to the FmHA on three notes. The first note was dated April 14, 1969, and was in the amount of $384,000; the second was dated June 9, 1970, and was for $45,500; and the third, dated July 15, 1981, was for $388,000.

In 1989, RWC elected to repurchase its notes from the FmHA pursuant to a government debt buy-back program. See Omnibus Budget Reconciliation Act of 1986 [OBRA], Pub. L. No. 99-509, § 1001, 100 Stat. 1874 (1986), as amended by Agricultural Credit Act of 1987 [ACA], Pub. L. No. 100-233, § 803, 101 Stat. 1714 (1988) (codified at 7 U.S.C. § 1929a note). Accordingly, on May 5, 1989, RWC borrowed money from the National Bank for Cooperatives and purchased or paid off all of its then-outstanding indebtedness to the FmHA at a discounted rate. After the buy-back, each of the FmHA notes was marked "SATISFIED IN FULL--FmHA." Appellant's App., Vol. II at AP597, AP599. When RWC's assets and liabilities were transferred to Plaintiff in 1991, its obligations to the Bank were included in the transfer. Plaintiff remains indebted to the Bank at this writing. On September 28, 1994, as Sequoyah-7, Plaintiff took out another FmHA loan in the amount of $331,400 to fund the construction of a project entitled "Redline." Plaintiff remains indebted to the FmHA on the 1994 loan.

We are concerned in this case with three periods of time during which Plaintiff alleges that it was indebted to the FmHA and during which Defendants allegedly began serving customers within Plaintiff's territory. The first relevant period of time is between April 14, 1969, the date on which

RWC first became indebted to the FmHA, and May 5, 1989, the date on which RWC repurchased its loans from the FmHA. Sometime during this time period, Defendants began providing water service to two customers within Plaintiff's territory, the Gunter Ridge Addition and the Gold Crown Motel, which at the time was known as the Diana Motel.

Sometime between May 5, 1989, and September 28, 1994, the date on which Plaintiff obtained its final loan from the FmHA, Defendants began providing water service to the following additional customers within Plaintiff's territory:

(1) Cherokee Rock Addition, Lots 2, 13, and 14
(2) FWCC Trucking, location number 820138
(3) J.D. Hill, location number 820127
(4) Laster Realty Co., location number 839861
(5) Rasamy Mangboupha, location number 820149

After September 28, 1994, Defendants began serving the following customers within Plaintiff's territory:

(1) Cherokee Rock Phase I, Lots 1, 3-12
(2) Food Plus/Dollar General Store, location number 816937
(3) Bob Pruitt Property (John Bogner), location number 817806
(4) FWCC Trucking Office, location number 819929
(5) OK Industries (a/k/a OK Foods), location number 816893
(6) J.D. Hill Truckwash, location number 820166
(7) Doug Harvell, location number 820182

Both Plaintiff and Defendants filed motions for partial summary judgment, and Defendants filed a motion to dismiss Plaintiff's state law claims. In an Order dated June 12, 1998, the district court denied Plaintiff's motion for partial summary judgment, granted Defendants' motion for partial summary judgment, and dismissed Plaintiff's remaining claims.[4] The court first explained that to establish its entitlement to protection under § 1926(b), Plaintiff must prove that "(1) it is an 'association' within the meaning of the Act; (2) it has a continuing indebtedness to the FmHA; and (3) [Defendants have] encroached upon or invaded an area to which [Plaintiff] has 'made service available.' Appellant's App., Vol. III, Doc. 19 at AP957 (citation omitted). Noting that Defendants did not contest Plaintiff's status as an "association," the court then held that, because Plaintiff repurchased its 1969, 1970, and 1981 notes from the FmHa on May 5, 1989, it was no longer indebted to the FmHA. Thus, the court found that, as of May 5, 1989, the protection afforded to Plaintiff by § 1926(b) was "extinguished and no action taken by [Defendants] prior to that time is actionable." Id. at AP960. The court then evaluated whether Plaintiff was entitled to relief for encroachments occurring after September 28, 1994, the date on which Plaintiff obtained a new loan from the

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[4] Because the parties had entered a stipulation of dismissal as to Plaintiff's state law claims prior to the court's disposition of the partial summary judgment motions, the court noted that Defendants' motion to dismiss was moot. See Appellant's App., Vol. III, Doc. 19 at AP951 n.2. The parties also entered a stipulation of dismissal with respect to Plaintiff's two antitrust claims prior to the court's summary judgment order. See. id. Plaintiff has not raised these issues on appeal.

FmHA. Because it was undisputed that Plaintiff was indebted to the FmHA after September 28, 1994, this determination turned on whether Defendants had "encroached upon or invaded an area to which Plaintiff ha[d] 'made service available.'" Id. at AP961. The court concluded that Plaintiff had not made service available to the disputed customers because it had no duty under state law to do so, see id., and because it either did not have sufficiently proximate facilities or sufficient capacity to serve the customers. See id. at AP964-65. Its conclusion was based in part on the fact that Plaintiff "would require customers[] who are already being adequately served by [Defendants][] to pay for improvements to [Plaintiff's] distribution system." Id.

II.

We review the grant or denial of summary judgment de novo, and we apply the same legal standard employed by the district court pursuant to Federal Rule of Civil Procedure 56(c). See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. If there is no genuine issue of material fact in dispute,

> then we next determine if the substantive law was correctly applied by the district court.

Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793,796 (10th Cir. 1995).

This court has stated that "Congress enacted 7 U.S.C. § 1926(b) as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices, water service or management, waste facilities, or essential community facilities to farmers, ranchers, and other rural residents." Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1214 (10th Cir. 1988). "The legislative history of section 1926(b) demonstrates that Congress intended to protect rural water districts from competition in order to encourage rural water development." City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81, 88 (Colo. 1995); see also S. REP. No. 566 (1961), reprinted in 1961 U.S.C.C.A.N. 2243, 2309 (explaining that 7 U.S.C. § 1926(b) was enacted "to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system"). In addition, § 1926(b) was intended "to provide greater security for the federal loans made under the program." Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 173 F.3d 517, 520 (4th Cir. 1999).

Section 1926(b) states in full:

> The service provided or made available through any such association shall not be

> curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b). This court has held that to receive the protection against competition provided by § 1926(b) a water association must (1) have a continuing indebtedness to the FmHA and (2) have provided or made available service to the disputed area. See Glenpool, 861 F.2d at 1214. The purpose of the second inquiry is to determine whether the disputed customers are within the water association's service area, i.e., "that area to which [Plaintiff] provided service or made service available." Bell Arthur, 173 F.3d at *525*. Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory. See North Alamo Water Supply Corp. v. City of San Juan, Tex., 90 F.3d 910, 913 (5th Cir. 1996) ("The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachments."); see also Jennings Water, Inc. v. City of North Vernon, Ind., 895 F.2d

311, 315 (7th Cir. 1989) (listing five federal courts which have concluded that § 1926 should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment).

In this appeal, Plaintiff first argues that the district court erred in finding that, when Plaintiff repurchased its notes from the FmHA, it lost the protection to which it was entitled under 7 U.S.C. § 1926(b). Plaintiff claims that it has been entitled to continued protection under § 1926(b) since 1969, when it first became indebted to the FmHA. Plaintiff also argues that all of the disputed customers are within its service area by virtue of both its legal duty to serve the customers and its capacity to serve the customers within a reasonable time after service is requested. At the very least, Plaintiff claims that genuine issues of material fact should have precluded summary judgment on the issue of whether it had or could provide sufficiently proximate and adequate facilities to serve the disputed customers within a reasonable time.

A.

We begin our analysis with the continuing indebtedness prong of § 1926(b). Because there is no question that Plaintiff was indebted to the FmHA between April 14, 1969, and May 5, 1989, and that Plaintiff again became indebted to the FmHA after September 28, 1994,[5] the

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[5] Defendants argue that, because Plaintiff obtained its 1994 loan from the FmHA to finance a particular project, this indebtedness could not be used to obtain protection for other

critical issue is the effect of Plaintiff's repurchase of its notes from the FmHA on its status as an FmHA debtor prior to 1994. Plaintiff argues that the repurchase did not disrupt its entitlement to protection from competition under § 1926(b), and that, as a result, it is entitled to relief not only for encroachments occurring prior to the repurchase but also for encroachments occurring between the date of the repurchase and the 1994 loan. Defendants urge us to affirm the district court's conclusions that the repurchase extinguished Plaintiff's protection under § 1926(b) and that any encroachments which occurred prior to May 5, 1989, are not actionable.

The legislative background of the loan repurchase program sheds some light on whether Congress intended the protection of § 1926(b) to extend to borrowers who repurchase their obligations from the federal government. Congress enacted provisions requiring the FmHA to sell its notes and other obligations "[a]s part of an overall effort to reduce the federal deficit." Ute Water, 900 P.2d at 89; see OBRA § 1001(a)-(e) (codified at 7 U.S.C. § 1929a note, subsections (a)-(e)). Subsequently, Congress amended OBRA by requiring the FmHA to provide rights of first refusal to its

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customers served by Defendants. We reject this argument for two reasons. First, even though the loan was used to fund a particular project, all of Plaintiff's territory was pledged as security for the loan. See Appellant's App., Vol. II, Doc. 12 at AP675-76. Second, we agree with the Bell Arthur court's recent conclusions that there is no statutory support for the "position that the scope of § 1926(b) protection is limited to the geographical area being financed by the loan. . . [and that] [i]t would defeat the protection[] intended by that section to [so] limit [it]. Bell Arthur, 173 F.3d at 524.

debtors before it attempted to sell the obligations to third party purchasers. See OBRA § 1001 (f), as amended by ACA § 803(f) (codified at 7 U.S.C. § 1929a note, subsection (f)). As part of the same series of amendments, Congress enacted the following provision:

> **Applicability of Prohibition on Curtailment or Limitation of Service.**--Section [1926(b)] . . . shall be applicable to *all* notes or other obligations sold or intended to be sold under this section.

OBRA § 1001(g), as amended by ACA § 803(g) (codified at 7 U.S.C. § 1929a note, subsection (g)) (emphasis added).

Although § 803(g) clearly extends the protection of § 1926(b) to situations in which the government sells notes or other obligations to third parties, courts have reached differing conclusions regarding whether § 803(g) extends the protection to issuers who repurchase their own notes or obligations from the government. The Colorado Supreme Court addressed the interpretation of § 803(g) in a case involving an issuer repurchase in which "the intent of the parties. . . was to keep the. . . bond active and not discharge the debt." Ute Water, 900 P.2d at 93. The intent of the parties was demonstrated not only by testimony to that effect but also by the fact that in transferring the bond back to the water district, the FmHA did not mark the instrument "'paid in full,' which would have canceled or discharged the debt." Id. at 94. Thus, the bond remained outstanding even "after the [water] [d]istrict reacquired the instrument." Id. The court held that § 803(g) extended the protection of § 1926(b) "to *all* notes and bonds sold by the FmHA–including those

reacquired by the issuer with the intent not to discharge the instrument, as in the present case." Ute Water, 900 P.2d at 92 (emphasis added). Thus, the result in Ute Water turned on the facts that the parties did not intend to extinguish the underlying debt and "that state law permitted a bond issuer to reacquire its own bond without extinguishing the debt." Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 41 (6th Cir. 1996) (citing Ute Water, 900 P.2d at 93), cert. denied, 521 U.S. 1111 (1997).

To date, only two federal circuit courts have addressed the issue of whether § 803(g) extends the protection of § 1926(b) to issuers who repurchase their own obligations from the government. Relying on applicable statutory language, congressional intent, and reasons of public policy, these courts have held that § 1926(b) does not apply to situations in which the issuer repurchases its own notes or other obligations from, and at the same time cancels its debt to, the government, in spite of the apparently contrary indication in § 803(g). See Bell Arthur, 173 F.3d at 523; Scioto Water, 103 F.3d at 42.

In Bell Arthur, the Fourth Circuit acknowledged that providing issuers who repurchase their notes with continuing protection from competition–the approach taken by the Colorado Supreme Court in Ute Water and advocated by Plaintiff in this case–"may have some superficial textual appeal" based on the language of § 803(g). Bell Arthur, 173 F.3d at 522. The court went on to explain, however, that "a closer reading of the applicable statutes reveals that such an interpretation is at odds with their language, the overall statutory structure, and the congressional purposes." Id. The critical distinction lay in the fact that when a third party

purchases a note from the FmHA "the issuer's indebtedness remains outstanding," but when an issuer purchases its own notes from the FmHA, and at the same time cancels the notes, "then the indebtedness ends." Id. at 523. According to the court, "[t]he latter transaction is actually a *retirement* of the debt by the issuer rather than a *sale* of the debt." Id. (emphasis added). Because "the issuer of the note who exercises the right of first refusal retires its debt *before* notes can be 'sold or intended to be sold[,]'. . . [the issuer] cannot receive the § 1926(b) protection granted by [§ 803(g)]." Id. Thus, the Fourth Circuit concluded that Congress

> could not have meant to include notes retired because retired notes need no protection. The protection afforded by § 1926(b) is meant to secure outstanding notes against default by protecting the income of the notes' issuer. When the indebtedness–whether to the federal government or to its assignees–is retired, however, no such protection is needed.

Id.

The Sixth Circuit similarly held that issuers who repurchase their notes from the FmHA are not entitled to continuing § 1926(b) protection. See Scioto Water, 103 F.3d at 42. According to the court, "[w]hen an issuer buys back its own bond and cancels the debt, . . . it no longer qualifies as a debtor for § 1926(b) protection." Id. In the instant case, because the FmHA marked the water district's bonds "'paid in full'" when the water district repurchased the bonds, the debt was "discharged, not sold." Id. Thus, the court held that, under the circumstances, § 803(g) applies only to

obligations sold to third parties, not to debts repurchased by issuers. See id.

We agree with the Bell Arthur and Scioto Water courts that § 803(g) does not extend the protection of § 1926(b) to issuers who repurchase their obligations from the government and in so doing discharge or cancel the underlying obligation to the government. The overall structure of the statutory scheme indicates that Congress did not intend § 803(g) to apply to issuer repurchases. Because Congress enacted the provision requiring the government to offer rights of first refusal to issuers after it enacted the provisions requiring the sale of its debt to the public, it is likely that Congress considered the two types of transactions to be separate. See OBRA § 1001(a) (codified at 7 U.S.C. § 1929a note, subsection (a)); see also ACA § 803(f) (codified at 7 U.S.C. § 1929a note, subsection (f)). It follows that in referring to notes or obligations "sold or intended to be sold" in § 803(g) Congress was referring only to sales to third parties. Section 803(f) lends credence to this interpretation because it directs the government to offer rights of first refusal to issuers "'*[b]efore* conducting a sale of a portfolio of notes.'" ACA § 803(f)(1) (codified at 7 U.S.C. § 1929a note, subsection (f)) (emphasis added); see Bell Arthur, 173 F.3d at 523.

Two additional justifications support this analysis. First, when the government sells a note or other obligation to a third party, it must provide some assurance to the third party about the likelihood that the debt will be repaid. As the Fourth Circuit explained in Bell Arthur, part of the reason Congress enacted § 803(g) was "undoubtedly to make [the loans the government was selling] more secure upon sale and thus more marketable." Bell Arthur, 173 F.3d at 523. By

extending the § 1926(b) protection to water associations "'during the term' of the loan," § 803(g) gives "the third party purchaser the same assurance of repayment that the federal government had had as the holder of the notes." Id. On the other hand, there is no need to provide assurance of repayment to an issuer who repurchases its own loan. Second, depending on the terms of a third party sale, the government may remain liable to the purchaser in the event of a default by the issuer. In comparison, when an issuer repurchases its notes from the government and simultaneously cancels them, there is no risk of continued governmental liability. We therefore hold that § 803(g) does not extend the protection of § 1926(b) to issuer repurchases when the underlying debt to the government is simultaneously canceled or retired.

In this case, as in Scioto Water, the notes Plaintiff repurchased from the FmHA were marked "SATISFIED IN FULL," Appellant's App., Vol. II at AP597, AP599, and thus "the debt was. . . discharged, not sold. " Scioto Water, 103 F.3d at 42. Because the § 1926(b) protection does not extend to issuers who repurchase their own notes or other obligations from the FmHA and in so doing discharge the underlying debt to the FmHA, Plaintiff may not seek relief for encroachments which occurred or continued to occur between the date of the repurchase, May 5, 1989, and the date of the final loan, September 28, 1994. However, we still must decide whether the encroachments which occurred prior to May 5, 1989, are actionable. Citing Scioto Water, 103 F.3d at 40-42, and the district court opinion in Bell Arthur, see Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 972 F. Supp. 951,957-59 (E.D.N.C. 1997), the district court in this case held that, because the repurchase extinguished Plaintiff's

entitlement to protection under § 1926(b), no encroachments occurring prior to the repurchase were actionable. We disagree.

First, neither Bell Arthur nor Scioto Water supports the proposition that encroachments occurring prior to an issuer repurchase but during the term of indebtedness are not actionable. The Bell Arthur court simply held that the § 1926(b) protection did not extend *beyond* the date of the repurchase, see Bell Arthur, 173 F.3d at 523-24; it did not hold that water associations would not be entitled to relief for encroachments occurring *prior* to a repurchase, i.e., during the period of indebtedness. In fact, this question was not even before the Bell Arthur court because in that case the only alleged encroachment occurred in 1995, which was after the water association had repurchased its loans from the FmHA in 1989 and after it had obtained a new loan from the FmHA in 1993. See id. at 520-21. In Scioto Water, the court similarly was not required to decide the issue because the encroachment in that case occurred after the water district repurchased its debt from the FmHA. See Scioto Water, 103 F.3d at 40. As in Bell Arthur, the court merely held that the water district was not entitled to § 1926(b) protection for the period *after* it repurchased its bonds from the FmHA and canceled its debt. See id. at 42.

Second, we can think of no reason why a water association which repurchases or otherwise repays its debts should lose the protection to which it was entitled during the period of indebtedness. To so hold would defeat the purpose of offering the protection because a water association which repurchased or paid off its debt but which otherwise met the statutory requirements would have no recourse for

encroachments that occurred or began while it was indebted to the government. Such a rule clearly would defy the language of § 1926(b), which expressly prohibits encroachments "during the term of such loan." 7 U.S.C. § 1926(b). This rule would also create a disincentive for water districts to repay their loans and would encourage municipalities and other competitors to encroach without concern for any resulting liability. We therefore conclude that, even if a water association has repurchased its loan and discharged its debt to the government, encroachments which occurred during the term of the loan are protected.

Because Plaintiff was indebted to the FmHA prior to May 5, 1989, and after September 28, 1994, it has satisfied the first prong of the § 1926(b) analysis with respect to those periods. We therefore reverse and remand to the district court for further proceedings consistent with this opinion.[6]

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[6] On remand, the district court will be required to address at least three issues with respect to the pre-1989 period. First, as discussed in greater detail below, Plaintiff must demonstrate that it "made service available" to the customers that Defendants allegedly began serving before the repurchase date. Second, even if Plaintiff has met the requirements for § 1926(b) protection for this period, the applicable statute of limitations may bar Plaintiff from seeking redress. Finally, assuming that Plaintiff meets the requirements for § 1926(b) protection and that relief is not barred by the statute of limitations, the court must determine what remedy is appropriate for Defendants' encroachments of Plaintiff's territory.

B.

We now examine whether Plaintiff has established genuine issues of material fact with respect to the "made service available" prong of the § 1926(b) inquiry. Although we have determined that Plaintiff was indebted to the FmHA during the pre-1989 and post-1994 periods, we must assess whether Plaintiff made service available to the customers served by Defendants during those periods.[7] In addition, although Plaintiff cannot seek relief for encroachments occurring between May 5, 1989, and September 28, 1994, because it was not indebted to the FmHA during that period, we still must examine whether Plaintiff has established genuine issues of material fact concerning whether it made service available to the customers which Defendants began serving during that period. We undertake this inquiry for purposes of determining whether Plaintiff may seek relief for

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[7] Defendants argue that certain customers are not within Plaintiff's service area because it failed to comply with state law in forming its territory, as defined by state law, in 1991. However, because Defendants do not seem to challenge the district court's conclusion that Plaintiff "is a continuation of Sequoyah-4 and its successor, RWC," Appellant's App., Vol. III, Doc. 19 at AP957, the contours of Plaintiff's territory should be examined from the date it came into existence as Sequoyah-4. Further, this argument is not properly before us because the district court did not rule on it. For these reasons, we assume that the disputed customers are within Plaintiff's territory as it is defined by state law. Whether the customers are within Plaintiff's service area is the subject of this section of our opinion and depends on whether it made service available to them within the meaning of § 1926(b).

encroachments which continued beyond the date of the 1994 loan.

Courts are in disagreement about what is required to satisfy the "made service available" requirement of § 1926(b). One court has held that a water association may meet the requirement simply by showing that it has a legal obligation to provide water service to the customer. See North Alamo, 90 F.3d at 917 (holding that a legal duty to provide service is the "legal equivalent to. . . 'making service available' under § 1926(b)").[8] Generally, courts applying the legal duty test

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[8] Other courts have emphasized that the water association must have a legal right, under state law, to provide service to the customer. See Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 967 F. Supp. 1483, 1525 (N.D. Iowa 1997) (explaining that whether a water association has made service available depends partly on "legal authority to provide service"); Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 29 F. Supp.2d 975, 991 (N.D. Iowa 1998) (indicating that legal right to serve is required to demonstrate that association made service available); cf. Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky., 93 F.3d 230, 238 (6th Cir. 1996) (noting water district's lack of authorization to provide service under Kentucky law). The distinction between a legal *duty* to provide service and a legal *right* to provide service is crucial because, in our view, the latter is always required. Without a right to provide service arising from state law, a water association would be unable to assert its entitlement to protection under § 1926(b) in the first instance because the association would not legally have "provided or made available" any service. 7 U.S.C. § 1926(b); see also City of Sioux Ctr., 967 F. Supp. at 1527 ("Where an indebted association has no legal right to provide service, it is not required by [7 C.F.R. § 1942.17(n)(2)(vii)] to provide such service, and, logically, it also should not obtain

have looked to state law to make the determination. See, e.g., id. at 915-916 (examining utility's duty to provide service under Texas law); Bell Arthur, 173 F.3d at 526 (citing cases examining both existing facilities and state law duty to provide service and holding that nonprofit water corporation had no duty to serve under North Carolina law). Another approach to meeting the requirement is known as the "pipe[s]-in-the-ground" or "physical ability" test. Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 967 F. Supp. 1483, 1525 (N.D. Iowa 1997); see Pittsburgh County Rural Water Dist. No. 7 v. City of McAlester, No. CIV-97-185-B, 1997 WL 835210, at *6 (E.D. Okla. 1997). This test examines whether a water association "has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." Bell Arthur, 173 F.3d at 526; see also Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky., 93 F.3d 230, 237 (6th Cir. 1996) ("[W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served."). Finally, some courts have examined both the water association's state law duty to provide service and the proximity and adequacy of its facilities in determining whether it made service available. See Bell Arthur, 173 F.3d at 526. Regardless of the manner in which this second prong is satisfied, Plaintiff must have made service available "prior to the time an allegedly encroaching association beg[an] providing service in order to

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protection from § 1926(b) for its illegal provision of service."). In any event, neither party contests Plaintiff's right to provide service to the customers which are undisputably within its territory.

be eligible for [§] 1926(b) protection." Lexington-South, 93 F.3d at 237.

This court has not definitively established a standard for meeting the "made service available" requirement. In Glenpool, we relied on both the association's water "line adjacent to the property and its responsibilities [to provide water service] to applicants within its territory" in concluding that the water association had made service available to the disputed customer. See Glenpool, 861 F.2d at 1214. However, Glenpool did not hold that both a legal duty and proximate and adequate facilities *were required* to meet this element of § 1926(b). In fact, Glenpool did not expressly hold that Oklahoma water districts have a legal duty to provide service; it merely referred to a specific water district's "responsibilities to applicants within its territory" in affirming a factual finding by the district court. Id.

In this case, the district court specifically determined that Oklahoma "state law does not mandate or require rural water districts to provide water service." Appellant's App., Vol. III, Doc. 19 at AP961; see also Pittsburgh County Rural Water Dist., 1997 WL 835210, at *5 (concluding that Oklahoma law does not impose "any obligation or duty on. . . the district to provide service"). We agree. Under Oklahoma law, the provision of water service centers around the "benefit unit," which is defined as "a legal right to one service connection to the district's facilities and to participate in the affairs of the district." OKLA. STAT. ANN. tit. 82, § 1324.2(7). Landowners within a rural water district's territory may "subscribe to a number of [benefit] units in proportion to the extent [they] desire[] to participate in the benefits of the improvements" made by the districts. Id. § 1324:12. "As

long as the capacity of the district's facilities permits, participating members. . . may subscribe to additional units upon payment of a unit fee for each such unit." Id. Further, although water districts must inform the customers within their districts how many benefit units are available for subscription, the districts have discretion to grant benefit units to new applicants for service, who also must pay a unit fee. See id. Two features of these statutes convince us that Oklahoma water districts are not under a state law duty to provide service to the customers within their territories. First, water districts are not required to provide additional benefit units to existing customers unless they possess the capacity to do so. See id. The statutes do not oblige water districts to expand their facilities to provide additional service to existing customers. Second, water districts have discretion to decide whether to provide benefit units to new applicants. In short, we cannot discern from the Oklahoma statutes a legal obligation to provide service.

Although we have determined that there is no state law duty to provide service in this case, we think that the existence of such a duty is relevant to the "made service available" inquiry because it substantially affects the likelihood that the association has provided or readily can provide service.[9] Nevertheless, we do not think that a such a

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[9] Plaintiff argues, and we agree, that the federal regulations governing the FmHA loan program impose a duty to provide service on loan recipients. In fact, it is clear that by accepting loans from the FmHA, Plaintiff agreed to abide by the governing federal regulations, which specifically require the provision of adequate service to customers "within the service area who can feasibly and legally be served." 7 C.F.R.

duty, standing alone, is sufficient to meet the "made service available" requirement. For one thing, to hold that a legal duty is sufficient to meet the requirement would be contrary to the language of the statute, which provides protection only against curtailments of "service provided or made available" by water associations. 7 U.S.C. § 1926(b). In addition, allowing a water district to meet the requirement simply by showing a legal duty to serve may undermine one of the principal goals of the statute, which is to "encourage water development by expanding the number of potential users of such systems." City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057, 1060 (5th Cir. 1987). "Inherent in the concept of providing service or making service available is the *capability* of providing service, or, at a minimum, of providing service within a reasonable time." Bell Arthur, 173 F.3d at 526. If a water association has a legal duty to provide service but has no proximate or adequate facilities or cannot provide them within a reasonable time, it is the customer who suffers. For these reasons, we think that the second prong of § 1926(b) should focus primarily on whether the water association has in *fact* "made service available," i.e., on whether the association has proximate and

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§ 1942.17(n)(2)(vii); see Wayne v. Village of Sebring, 36 F.3d 517, 528 (6th Cir. 1994) (stating that 7 C.F.R. § 1942.17(n)(2)(vii) requires applicants for FmHA funds to "agree, as a condition of receiving funds, that a person within the service area who can feasibly and legally receive water service has a direct and private right of action against the fund recipient if the recipient fails to make adequate service available"). Because all FmHA loan recipients are subject to this federal duty, however, we do not think that the "made service available" requirement should turn on this duty.

adequate "pipes in the ground" with which it has served or can serve the disputed customers within a reasonable time.

As mentioned above, a water association meets the "pipes-in-the-ground" test by demonstrating "that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." Bell Arthur, 173 F.3d at 526. This is essentially an inquiry into whether a water association has the capacity to provide water service to a given customer. See id.; City of Sioux Ctr., 967 F. Supp. at 1525. Plaintiff argues that the district court incorrectly concluded that Plaintiff did not make service available because it either did not have facilities proximate to the customers or because its facilities were insufficient to meet the customers' needs. According to Plaintiff, genuine issues of material fact should have precluded summary judgment on these issues. We examine the customers in the order in which Defendants allegedly began providing service to them.

The Gunter Ridge Addition and the Gold Crown Motel are the only two customers which Defendants allegedly began serving between April 14, 1969, and May 5, 1989. The record shows that Plaintiff has a two-and-a-half-inch line running across the east side of the Gunter Ridge Addition and a two-inch line running across the west side. See Appellant's App., Vol. I, Doc. 6 at AP67. Both lines have been in existence since 1970. See id. The only evidence in the record indicates that the lines were large enough to meet the potable water needs of the development and that the lines could be upgraded to provide fire protection for

approximately $50,000.[10] See. id. at AP411. The record also shows that Plaintiff has a three-inch water line running across the south side of the property of the Gold Crown Motel, see id. at 67, which has been in existence since 1970, and that this line "would be sufficient to provide potable water service to the motel." Id. at AP411. We do not think that this evidence shows, as a matter of law, that Plaintiff did not have sufficiently proximate and adequate facilities to serve these customers or that it would be unable to provide adequate service within a reasonable period of time. To the contrary, we think this evidence at least establishes genuine issues of material fact as to whether Plaintiff's facilities were proximate and adequate to serve the disputed customers during the pre-1989 period.

With respect to the customers which Defendants began serving between May 5, 1989, and September 28, 1994, the record reveals the following:

(1) Cherokee Rock Addition: Plaintiff has a two-inch water line constructed in

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[10] For remand purposes, we point out that the United States District Court for the Northern District of Ohio recently held that, because § 1926(b) was not enacted to supply fire protection, a water association's capacity to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b). See City of Sioux Ctr., 29 F. Supp.2d at 992-94; cf. Rural Water Dist. #3 v. Owasso Utils. Auth., 530 F. Supp. 818, 823 (N.D. Okla. 1979) (stating that § 1926(b) "was not enacted for the purpose[] of fire protection--it was enacted to provide means of securing a 'safe and adequate supply of running household water.'" (citation omitted)).

1970 which is approximately 200 feet from the development's connection to Defendants' water line. This line "would be sufficient to provide potable water service" but not to provide fire protection. Id. at AP411. Plaintiff also has a six-inch line constructed in 1982 which is approximately 1320 feet from the connection and "which is more than sufficient to meet all the water needs of the" development. Id. at AP66; see also id. at AP411 (stating that six-inch line could provide fire protection for a cost of approximately $7,000).

(2) FWCC Trucking:[11] Plaintiff has two-and-a-half-inch lines on the north and south sides of the property. See id. at AP411. Both lines were constructed in 1970. See id.

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[11] The record indicates that there are two separate FWCC properties, one of which Defendants began serving prior to 1994 and one of which it began serving after 1994. See Appellant's App., Vol. I, Doc. 5 at AP45 (referring to FWCC Trucking location number 820138, which Defendants began serving prior to 1994, and to FWCC Trucking location number 819929, which Defendants began serving after 1994). In any event, both properties have two-and-a-half-inch lines approximately 200 feet away. See id. at AP67, AP411.

(3) J.D. Hill (location number 820127): The record indicates that Plaintiff has a two-and-a-half-inch line approximately 200 feet to the west of this customer. See id. at AP67.

(4) Laster Realty Co.: Plaintiff has a two-and-a-half-inch line running across the west side of the property. See id. at AP68.

(5) Rasamy Mangboupha: Plaintiff has a two-and-a-half-inch line constructed in 1970 running approximately 400 feet south of this customer. See id. at AP68.

With respect to FWCC Trucking, J.D. Hill, Laster Realty Co., and Rasamy Mangboupha, the record indicates that Plaintiff's existing facilities could provide potable water service but not fire protection. See id. at AP411. However, fire protection could be obtained for these customers for approximately $50,000. See id. Like the evidence for the customers which Defendants began serving prior to May 5, 1989, this evidence is sufficient to establish genuine issues of material fact with respect to the proximity and adequacy of Plaintiff's facilities.

Finally, we think the evidence also precludes summary judgment on the customers which Defendants began serving after September 28, 1994. The record reveals the following as to these customers:

(1) Cherokee Rock Phase I: The record is unclear about Plaintiff's facilities with respect to this development. However, Plaintiff has alleged that the facilities for this area are the same as those for the Cherokee Rock Addition, described above, i.e., a two-inch water line approximately 200 feet from the development's connection to Defendants' water line and a six-inch line approximately 1320 feet from the connection.

(2) Food Plus/Dollar General Store: Plaintiff has a two-and-a-half-inch line constructed in 1970 running across the south side of this property. See id. at AP66.

(3) Bob Pruitt Property (John Bogner): Plaintiff has a two-and-a-half-inch line on the north side of the property and a two-and-a-half-inch line on the south of the property. See id. at AP 411. Both lines were constructed in 1970. See id.

(4) FWCC Trucking Office: Plaintiff has a two-and-a-half-inch line constructed in 1970 running approximately 400 feet to the south of this customer. See id. at AP67.

(5) OK Industries: Plaintiff has an eight-inch line constructed in 1982 approximately one mile to the east of this customer. See. id. at AP410. The record indicates that this line could be extended for approximately $50,000 to meet the customer's needs. See id.

(6) J.D. Hill Truckwash (location number 820166): Plaintiff has a two-and-a-half-inch line constructed in 1970 running about 400 feet to the south of this property. See id. at AP67.

(7) Doug Harvell: Plaintiff has a two-and-a-half-inch line running approximately 200 feet south of this customer. See id. at AP68.

Although Plaintiff's current facilities are sufficient for the customers' potable water needs, the record indicates that, for approximately $50,000, fire protection could be provided for the Food Plus/Dollar General Store, Bob Pruitt, FWCC Trucking, J.D. Hill Truckwash, and Doug Harvell properties. See id. at AP411. Plaintiff has presented sufficient evidence to withstand summary judgment with respect to whether its facilities were sufficiently proximate to these customers and with respect to whether it had the capacity to serve these customers within a reasonable time.[12]

In short, although additional clarifying proof may be needed to establish the exact distances between Plaintiff's lines and the disputed customers' properties, as well as Plaintiff's precise capacity to serve the disputed customers within a reasonable time, we conclude that Plaintiff has

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[12] Defendants argue that Plaintiff released its right to serve the Food Plus/Dollar General Store and the OK Industries customers and that it is now estopped to assert the right to serve these customers. See Appellee's Br. at 49. Because these issues were not considered by the district court and because the record is insufficient to address them, we leave these issues for the district court on remand.

established genuine issues of material fact with respect to whether it made service available to the customers. Indeed, the evidence indicating that Plaintiff's pipes ran across the property of certain customers is certainly sufficient to show that Plaintiff's facilities were proximate to those customers, and evidence showing longer distances between Plaintiff's pipes and the customers' properties clearly raises questions of fact on the issue of proximity. Viewing the evidence in a light most favorable to Plaintiff, we therefore conclude that summary judgment was improper on the issue of whether Plaintiff made service available for the two periods of time for which Plaintiff may seek relief under § 1926(b).

III.

In summary, because Plaintiff was indebted to the FmHA between April 14, 1969, and May 5, 1989, it is entitled to seek relief for Defendants' provision of service to the customers within Plaintiff's territory to which it establishes that it made service available. Although Plaintiff is not entitled to recover for any encroachments occurring or continuing between May 5, 1989, and September 28, 1994, because it was not indebted to the FmHA at the time, it may recover for encroachments occurring or continuing after September 28, 1994, the date on which it obtained another loan from the FmHA, so long as it establishes that it made service available to those customers. We also conclude that Plaintiff has established genuine issues of material fact regarding whether it made service available to the disputed customers for the encroachments occurring before 1989 and for those occurring or continuing after 1994. As noted above, evidentiary uncertainties should be resolved in favor of

Plaintiff, the party seeking to protect its territory, on remand.[13]

Accordingly, the district court's entry of summary judgment is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

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[13] We decline to address the additional arguments raised by Plaintiff in its Reply Brief because they were not presented to the district court and are not relevant to our disposition of this summary judgment appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed June 12, 1998]

No. 97-578-S

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,
Plaintiff,
v.

TOWN OF MULDROW, an Oklahoma town and the MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants.

ORDER

The following motions are before the court for its consideration: (1) Plaintiff Sequoyah County Rural Water District 7's motion for partial summary judgment, (2) Defendant Town of Muldrow's motion for partial summary judgment, and (3) Defendant Town of Muldrow's motion to dismiss state law claims. Plaintiff Sequoyah County Rural

Water District No. 7 ("Sequoyah-7") filed this action against Defendants Town of Muldrow and Muldrow Public Works Authority (collectively referred to as "Muldrow") seeking to enforce the provisions of 7 U.S.C. § 1926(b), which allows federally indebted rural water associations to service their territories free from the competition of municipalities. Sequoyah-7 claims Muldrow has violated § 1926(b) by selling water within Sequoyah-7's territory. Sequoyah-7 seeks to enforce the provisions of § 1926(b) by invoking the enforcement provisions of 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202. Sequoyah-7 seeks declaratory and injunctive relief, as well as damages for Muldrow's past sales of water. The parties have fully briefed the issues necessary for the resolution of § 1926(b) liability.[1] Based on the foregoing reasons, the court finds the issues in favor of Muldrow and grants its motion for partial summary judgment. Sequoyah-7's motion for partial summary judgment is denied.[2]

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[1] This parties have submitted this matter for resolution on their respective briefs. At the pretrial conference, it was agreed that a trial on the issue of damages would be necessary only if the court held in favor of Sequoyah-7 on its § 1926(b) claims.

[2] Muldrow's motion to dismiss Sequoyah-7's state law claims is moot. In its motion to dismiss, Muldrow sought the dismissal of Counts 6, 7, and 8. By stipulation of dismissal dated February 23, 1998, the parties dismissed without prejudice Counts 4, 5, 6, and 7. Thus, the only remaining Count related to Muldrow's motion to dismiss is Count 8 - a request that the court declare all water lines and facilities constructed by Muldrow to serve residents within Sequoyah-7's territory be held in trust for the use and benefit of Sequoyah-7. Given the court's rejection of

BACKGROUND

Sequoyah-7 is an agency and legally constituted authority of the State of Oklahoma created for the purpose of developing and providing an adequate water supply to serve and meet the needs of rural residents within Sequoyah-7's territory. Muldrow owns and operates a water production plant and water distribution system within the Town of Muldrow. In March 1991, Sequoyah-7 was established as a public nonprofit rural water district. The history of Sequoyah-7, however, can be traced back to October 18, 1966, when the Board of County Commissioners of Sequoyah County, Oklahoma, declared certain lands to be incorporated and organized as Rural Water District No. 4, Sequoyah County, Oklahoma ("Sequoyah-4"). The area incorporated into Sequoyah-4 in 1966 included the areas which are now in dispute in the present controversy between Sequoyah-7 and Muldrow. In 1969, all assets and liabilities of Sequoyah-4 were assigned to the Rural Water Corporation ("RWC") and Sequoyah-4 was dissolved. RWC was formed as a nonprofit corporation, in part, to provide a waterworks and distribution for the and benefit of its rural system use water consumers. In March 1991, Sequoyah-7 was created and all assets and liabilities of RWC were transferred to Sequoyah-7.

Shortly after it was created in 1969, RWC began to borrow funds from the FmHA to construct certain water

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Sequoyah-7's legal arguments for a § 1926(b) violation, the attendant claim in Count 8 for a constructive trust has no merit. Thus, the court's ruling in favor of Muldrow on the motion for partial summary judgment related to the § 1926(b) claims likewise resolves Count 8 in favor of Muldrow.

system facilities. RWC would eventually become obligated to the Farmers Home Administration ("FmHA") on three notes - an April 14, 1969, note for $384,000, a June 9, 1970, note for $45,500, and a July 15, 1981, note for $388,000. In May 1989, RWC participated in a program enacted under the Agricultural Credit Act of 1987 whereby bond issuers such as RWC could buy back their government debt at a discounted rate. As a result, RWC borrowed funds from the National Bank for Cooperatives ("NBC") and purchased or paid off its outstanding indebtedness to the FmHA on May 5, 1989. All promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA." As part of the conversion process, RWC transferred to Sequoyah-7 its obligations to NBC. Sequoyah-7 remains indebted to NBC on the notes issued in favor of NBC. On September 28, 1994, Sequoyah-7 borrowed $331,400 from the FmHA to fund the construction of the "Redline" project and pump station. Sequoyah-7 remains indebted to the FmHA on the September 28, 1994, loan.

During the period of time RWC remained indebted to the FmHA April 14, 1969, to May 5, 1989 - Muldrow began selling water to customers within the territory claimed by Sequoyah-7 as its service area. Muldrow began selling to customers within the Gunter Ridge Addition and to The Gold Crown Motel f/k/a Diana Motel during this time period. After RWC paid off its loans on May 5, 1989, but before Sequoyah-7 became indebted to the Fm/HA on September 28, 1994, Muldrow began providing water service to the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Addition

Lot 2, Diana Click location number 293684/293733

Lot 13, Michael Schroeder, location number 293667

Lot 14, Kevin Hauger, location number 293678

FWCC Trucking location number 820138

J.D. Hill, location number 820127

Laster Realty Co., location number 839861

Rasamy Mangboupha, location number 820149

Doug Harvell, location number 820182

After Sequoyah-7 became indebted to the FmHA on September 28, 1994, Muldrow added the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Phase I

Lot 1, Robert Powell
Lot 3, Twila McElhaney
Lot 4, Denny Sossemen
Lot 5, Gary Carmen
Lot 6, Clinton Rice
Lot 7, Denise & Lee Boyers

Lot 8, Henry Davis
Lot 9, Dane Leathem
Lot 10, Anthony Bowers
Lot 11, Donna Marion
Lot 12, Dennis Shryrock

Food Plus/Dollar General Store, location number 816937

Bob Prewitt Property (John Bogner), location number 817806

FWCC Trucking office, location number 819929

OK Industries (a/k/a OK Foods), location number 816893

J.D. Hill Truckwash, location number 820166

With respect to all of these customers, it is Sequoyah-7's position that Muldrow has violated § 1926(b) because it has sold water within Sequoyah-7's established territory.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 247-48 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of fact. Celotex v. Catrett, 477 U.S. 317, 325 (1986). If this initial burden is satisfied, the nonmoving party then has the burden of coming forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party cannot rest on the mere allegations of the pleadings, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which [it] carries the burden of proof." Applied Genetics v. First Affiliated Securities, 912 F.2d 1238, 1241 (10th Cir. 1990).

"A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Thomas v. IBM, 48 F.3d 478, 486 (10th Cir. 1995) (quoting Anderson, 477 U.S. at 248). In this regard, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). This court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. With these standards in mind, the court turns to the merits of parties' motions.

The central issue in this case is whether Muldrow has violated the statutory protections afforded Sequoyah-7 under

§ 1926(b) by selling water to consumers within Sequoyah-7's alleged territory.[3] Section 1926(b) is part of the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* ("the Act"). The Act authorizes the Secretary of Agriculture to make or insure loans to associations for a variety of reasons, including the "conservation, development, use, and control of water." 7 U.S.C. § 1926(a) (1). Section 1926(b) of the Act provides in pertinent part:

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any

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[3] As a preliminary matter, the court's jurisdiction over this controversy must be addressed. The language of § 1926(b) does not contain an enforcement mechanism. Nor does § 1926(b) contain language creating a private right of action. Courts which have addressed § 1926(b) claims have, however, permitted suits to be brought pursuant to the authority of 42 U.S.C. § 1983 for enforcement of § 1926(b) rights. Wayne v. Village of Sebring, 36 F.3d 517, 528-29 (6th Cir. 1994), cert. denied, 514 U.S. 1127 (1995); Rural Water System #1 v. City of Sioux Center, 967 F.Supp. 1483, 1503-05 (N.D. Iowa 1997). Thus, § 1983 is the procedural mechanism allowing Sequoyah-7 to enforce federally protected rights created under § 1926(b). City of Sioux Center, 967 F.Supp. at 1503-05. Moreover, the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202, provides an alternative enforcement vehicle for rural water districts seeking relief under § 1926(b). Id. at 1506-07; Lexington-South Elkhorn .Water Dist. v. City of Wilmore, 93 F.3d 230, 232 (6th Cir. 1996).

> private franchise for similar service within such area during the term of such loan. . . .

Sequoyah-7 claims to be an association entitled to the protections of § 1926(b) and, further, that Muldrow's actions of annexing certain areas and providing service to consumers within those areas are violations of § 1926(b) entitling it to relief.

Section 1926(b) is understood as "unambiguously prohibit[ing] any curtailment or limitation of a FmHA-indebted water association's services resulting from municipal annexation or inclusion." City of Madison v. Bear Creek Water Assoc., 816 F.2d 1057, 1060 (5th Cir. 1987). Thus, § 1926(b) operates a means to "encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and Farmers Home Administration loans." Lexington South Elkhorn, 93 F.3d at 233. The language of § 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." Bear Creek Water Assoc., Inc., 816 F.2d at 1059.

In order for Sequoyah-7 to establish its entitlement to the protections afforded under § 1926(b), it must prove the following elements: (1) it is an "association" within the meaning of the Act; (2) it has a continuing indebtedness to the FmHA; and (3) Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Lexington-South Elkhorn, 93 F.3d at 234; Bell Arthur Water v. Greenville Utilities Com'n, 972 F.Supp. 951, 959 (E.D.

N.C. 1997). With respect to the first element, Muldrow does not contest Sequoyah-7's status as an "association." As a public nonprofit rural water district created for the purpose of developing and providing an adequate rural water supply, Sequoyah-7 clearly qualifies as an "association" under the Act.

Sequoyah-7 must next establish a continuing indebtedness to the FmHA. In assessing the extent of such indebtedness, Muldrow attempts to restrict Sequoyah-7's attachment to a debt obligation to the September 28, 1994, loan from the FmHA. Muldrow contends Sequoyah-7 cannot avail itself of any loan with the FmHA which predated Sequoyah-7's formation in March 1991. According to Muldrow, the 1969, 1970, and 1981 debt obligations between RWC and the FmHA are not to be considered when determining the extent of the continuing obligation between Sequoyah-7 and the FmHA. The court rejects Muldrow's argument. A review of the materials before the court reveals that Sequoyah-7 is a continuation of Sequoyah-4 and its successor, RWC. All three entities were established for the same purpose - to develop and provide an adequate rural water supply for residents of Sequoyah County, Oklahoma. Upon the formation of Sequoyah-7, all assets and liabilities of RWC became the assets and liabilities of Sequoyah-7. 82 O.S. § 1324.33. The statutes under which Sequoyah-7 was created specifically provide that corporations such as RWC, which were formed prior to December 1, 1988, "may organize and constitute a district subject to the provisions of the Rural Water, Sewer, Gas and Solid Waste Management Districts Act." 82 O.S. § 1324.31. The court concludes Sequoyah-7 is a continuation of the corporate entity RWC; therefore, Sequoyah-7 is entitled, for purposes of § 1926(b)

protection, to avail itself of the loans RWC made with the FmHA beginning in 1969.[4]

It is undisputed, however, that RWC's loans with the FmHA were paid off in 1989. As part of a Congressional effort to reduce the deficit, the Omnibus Budget Reconciliation Act of 1986 required the FmHA to sell some of its bonds and other obligations. Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 40 (6th Cir. 1996), cert. denied, 117 S.Ct. 2497 (1997). Under the Agriculture Credit Act of 1987, the Secretary of Agriculture was required to offer bond issuers such as RWC the option of buying back the debt obligations before the Secretary offered them to third parties. Id. On May 5, 1989, RWC took advantage of this buy out program and extinguished its debt to the FmHA by paying off its obligation at a discounted rate and refinancing through a loan with NBC. With respect to this buy out, Sequoyah-7's financial statements reflect that "[i]n 1989, these loans with outstanding balances of $655,766 were paid off in the discounted amount of $377,931, and were refinanced by a loan in the amount of $320,000 with National Bank for Cooperatives." The promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA" and the debt was no longer carried in the financial records of either RWC or Sequoyah-7.

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[4] Given this finding, the court need not address Muldrow's argument that Sequoyah-7 does not have § 1926(b) protection as a result of its September 28, 1994, loan because that loan was specifically directed to another project and it did not cover the areas in dispute. See Bell Arthur, 972 F.Supp. at 959-61.

Since the federal indebtedness was paid off on May 5, 1989, Muldrow contends the protections afforded under § 1926(b) were extinguished on that date inasmuch as the necessary element of a federal indebtedness is lacking. Sequoyah-7 objects to Muldrow's characterization of the May 5, 1989, buy out program and contends the notes were "sold" as opposed to "discharged" by the discounted pay out and refinancing. Sequoyah-7 contends this distinction is significant because a provision of the Agricultural Credit Act of 1987 (known as "subsection (g)") states that the curtailment prohibition of § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section." By arguing that it "purchased" the notes from the FmHA, Sequoyah-7 seeks to secure the benefit of the coverage provided by subsection (g) and retain its § 1926(b) protections.

The court rejects Sequoyah-7's argument. Subsection (g) has no application to an issuer such as RWC who cancels its debt to the FmHA and refinances the debt through another entity. Subsection (g) is intended for those situations where the FmHA sells a note or debt obligation to a third party. Under this later scenario, the protections of § 1926(b) should "follow the note" as the debt has not been extinguished, but rather, merely transferred to a third party via a sale by the FmHA. When the federal debt is extinguished by the issuer, however, there is no need to extend such protections. The rationale for this distinction has been stated as follows:

> When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to

> one of the main legislative purposes in enacting § 1926(b) - safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid.

Scioto Water, Inc., 103 F.3d at 42. Moreover, the fact that issuers receive a substantial money-saving incentive when paying off their debt to the FmHA supports the existence of a rational basis for extending protection only to obligations sold to third parties, and not to obligations purchased by debtors through the buy out program. Bell Arthur, 972 F.Supp. at 959. Thus, when RWC, Sequoyah-7's predecessor, took advantage of the FmHA buy out program and paid off its debt to the FmHA on May 5, 1989, the protections enjoyed by RWC under § 1926(b) were extinguished and no action taken by Muldrow prior to that time is actionable. See Scioto Water, Inc., 103 F.3d at 40-42; Bell Arthur, 972 F.Supp. at 957-59; City of Sioux Center, 967 F.Supp. at 1523.

The court must next address the protections available to Sequoyah-7 following the May 5, 1989, buy out. It is undisputed that neither RWC nor Sequoyah-7 became indebted to the FmHA between May 5, 1989, and September 28, 1994. Consequently, there is no § 1926(b) protection available to Sequoyah-7 during this time period as no federal indebtedness existed. On September 28, 1994, however, Sequoyah-7 became indebted to the FmHA. Thus, the court must evaluate whether Sequoyah-7's claims arising after

September 28, 1994, including the continuation of service by Muldrow in Sequoyah-7's protected area, are actionable.

In order to evaluate Sequoyah-7's claims in this respect, the court must turn to the third element for a § 1926(b) violation - whether Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Section 1926(b) does not define the term "made service available." One approach to defining this term is to determine whether the "association" has a state law duty to provide service to the area in question. See North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910, 916 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996) (the existence of a state law duty to provide service "is the legal equivalent to"making service available under § 1926(b)); City of Sioux Center, 967 F.Supp. at 1530 (answer to question of whether a rural water district "had a legal right to serve depends entirely upon applicable state law.") Here, Sequoyah-7 cites to the Rural Water, Sewer, Gas and Solid Waste Management District Act, 82 O.S. §§ 1324.1-1324.35, §§ 1324.41-1324.50. The court has reviewed the provisions of this act and finds no duty or obligation on the part of Sequoyah-7 to provide water service. While rural water districts in Oklahoma are certainly formed in order to provide an adequate rural water supply to meet the needs of rural residents within the district's territory, state law does not mandate or require rural water districts to provide water service. Consequently, absent a legal obligation imposed under state law to provide water service to the area in question, the court must determine whether Sequoyah-7 has "made service available" under an alternative approach adopted by the federal courts which have addressed this issue.

An alternative test requires Sequoyah-7 to establish it has "made service available" by demonstrating its legal authority to serve the disputed territory in combination with a physical ability to do so.[5] The latter part of this inquiry is commonly referred to as the "pipe-in-the-ground test." City of Sioux Center, 967 F.Supp. at 1525; Bell Arthur, 972 F.Supp. at 961; see also Lexington-South Elkhorn, 93 F.3d at 237. The key component of this test is the proximity of the facilities to the area to be served:

> [W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.

Lexington-South Elkhorn, 93 F.3d at 237. In addition to determining whether Sequoyah-7's physical structures - pipes in the ground - are present to serve the disputed territory, the

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[5] Because the court concludes Sequoyah-7 has failed to present sufficient evidence to establish that it has made service available to the disputed territory, the court need not decide whether Muldrow's activities constitute a curtailment of Sequoyah-7's service area. Moreover, the court need not address Muldrow's arguments related to its contention that Sequoyah-7 does not have the legal authority to service the disputed territory.

court also considers whether the structure has the physical ability or capacity to meet the consumers' needs and whether fiscal constraints placed on, or by, Sequoyah-7 impede its ability to service the area. See Bell Arthur, 972 F.Supp. at 962-63 (in determining that rural water district had not made service available, the court considered the capacity of the existing structure and the fact that the rural water district did not have funds available to build the necessary additional lines).

Sequoyah-7 does not contend it has provided water service to the disputed territory in the past. Nor does it contend that it is currently providing such service. Rather, Sequoyah-7's argument is that it "has the ability to provide water service and has made water service available to all of the customers in the dispute." Affidavit of Tommy Click at ¶ 21 (Plaintiff's Exhibit No. 1 to Plaintiff's Motion for Partial Summary Judgment). Sequoyah-7's evidentiary basis for this assertion is found in the affidavit of Tommy Click, Manager of Sequoyah-7. As to the disputed territory and corresponding consumers, Click provides the following details regarding Sequoyah-7's facilities:

> Cherokee Rock Addition - Sequoyah-7 has a 2" water line constructed in 1970 that is approximately 200 feet from the Addition's connection to the Muldrow line. If this line is not sufficient to meet all needs of the Addition, Sequoyah-7 has a 6" line constructed in 1982 approximately 1320 feet from the Addition's connection which is more than sufficient to meet all the water needs of the Addition.

Food Plus/Dollar Store - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the south side of this property to which the customer could connect.

FWCC Trucking Office - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Gunter Ridge Addition - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the east side of the Addition and a 2" line on the west side of the Addition to which the customers could connect.

OK Industries - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

The Gold Crown Motel f/k/a Diana Motel - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

J.D. Hill Truckwash - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the west of the property to which the customer could connect.

J.D. Hill - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

Doug Harvell - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

Laster Realty Co. - Sequoyah-7 has a 2 ½" water line on the west side of the property to which the customer could connect.

Rasamy Mangboupha - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Based on this information, Sequoyah-7 contends it has satisfied the § 1926(b) requirement of having "made service available" to the disputed territory.[6] The court disagrees.

The mere fact that Sequoyah-7 has facilities near or within proximity to the areas and customers in question is insufficient. In Lexington-South Elkhorn, the Sixth Circuit rejected a similar argument. The distribution lines of the rural water district in Lexington-South Elkhorn were located fifty yards from one property and ranging from .1 to .4 miles from other properties. The Sixth Circuit, in affirming the district court's determination that the rural water district, Lexington-South Elkhorn, had not made service available,

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[6] Omitted from this list is any mention of Sequoyah-7's service facilities available with respect to the Bob Prewitt Property (John Bogner) and FWCC Trucking location No. 820138. Consequently, Sequoyah-7's § 1926(b) claim as to these two properties must fail due to the absence any proof that Sequoyah-7 has "made service available."

concluded that "[b]ased on the location of Lexington-South Elkhorn's distribution lines, it had not made service available prior to the time that [the municipality] began providing service to the disputed area." Id. at 237. Similarly, the distances of Sequoyah-7's water lines to the customers in question in this case, ranging from 200 feet to 1 mile, are not within sufficient proximity to establish that Sequoyah-7 has made service available to the disputed territory. Moreover, with respect to the Food Plus/Dollar General and OK Industries facilities, Sequoyah-7's 2 ½ inch water line is insufficient to service those customers' water needs. Without the capacity to deliver water in quantities sufficient to service these customers, it cannot be said that Sequoyah-7 has made service available. Bell Arthur, 972 F.Supp. at 962-63. Finally, in considering Sequoyah-7's argument for finding that it has made service available based on the proximity of its facilities, the court places great weight on the fact that Sequoyah-7 admittedly would require customers "to pay the cost to connect their facilities to Sequoyah-7's distribution system as provided by state law." The fact that Sequoyah-7 would require consumers, who are already being adequately serviced by Muldrow, to pay for improvements to Sequoyah-7's distribution system militates against a proximity finding in

favor of Sequoyah-7.[7] Id. Consequently, the court finds Sequoyah-7 is not entitled to protection under § 1926(b).

CONCLUSION

The court finds Sequoyah-7 to be ineligible for § 1926(b) protection because it has failed to make service available to the disputed territory and customers. Thus, Sequoyah-7's motion for partial summary judgment is denied and Muldrow's motion for partial summary judgment is granted. Sequoyah-7's claims for § 1926 (b) protection brought pursuant to 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202, and a constructive trust theory, are hereby dismissed. This action is therefore dismissed in its entirety.

IT IS SO ORDERED this 12th day of June, 1998.

/s/_____
Frank H. Seay
United States District Judge

---

[7] The court likewise rejects Sequoyah-7's alternate solution to the proximity issue - supply proximity by converting Muldrow's water lines to Sequoyah-7's. Sequoyah-7 relies on North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996), for this proposition. The court rejects this draconian remedy and finds it is not authorized by any legal authority. Sequoyah-7 has the affirmative obligation under section 1926(b) to make service available - it may not satisfy this obligation by riding the coattails of a municipality's constructive efforts to provide water service to consumers who would otherwise be without service.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed June 12, 1998]

No. 97-578-S

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, *Plaintiff*,	)
v.	)
TOWN OF MULDROW, an Oklahoma town and the MULDROW PUBLIC WORKS AUTHORITY, a public trust, *Defendants*.	)

JUDGMENT

Pursuant to the court's order entered simultaneously herein granting the motion for partial summary judgment filed by Defendants Town of Muldrow and the Muldrow Public Works Authority, judgment is entered in favor of Defendants and against Plaintiff Sequoyah-7 County Rural Water District

No. 7 on Plaintiff's claims brought under the authority of 7 U.S.C. § 1926(b).

Judgment is so entered this 12th day of June, 1998.

/s/_____
Frank H. Seay
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

[Filed September 28, 1999]

No. 98-7090

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff- Appellant,

v.

TOWN OF MULDROW, an Oklahoma Town, and MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants - Appellees.

ORDER

Before **PORFILIO, McKAY**, and **TACHA**, Circuit Judges.

Appellee's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of

the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/_____
Deputy Clerk

APPENDIX E

7 U.S.C. § 1926. Water and waste facility loans and grants.

(a) Criteria; definitions; limitation on allowable uses of Federal funds; inclusion of interest or other income in gross income on sale of insured loan

(1) The Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes. The Secretary may also make loans to any borrower to whom a loan has been made under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.), for the conservation, development, use, and control of water, and the installation of drainage or waste disposal facilities, primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents. When any loan made for a purpose specified in this paragraph is sold out of the Agricultural Credit Insurance Fund as an insured loan, the interest or other income thereon paid to an insured holder shall be included in gross income for purposes of chapter 1 of

Title 26. With respect to loans of less than $500,000 made or insured under this paragraph that are evidenced by notes and mortgages, as distinguished from bond issues, borrowers shall not be required to appoint bond counsel to review the legal validity of the loan whenever the Secretary has available legal counsel to perform such review.

(2) The Secretary is authorized to make grants aggregating not to exceed $590,000,000 in any fiscal year to such associations to finance specific projects for works for the development, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas. The amount of any grant made under the authority of this paragraph shall not exceed 75 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area. The Secretary shall fix the grant rate for each project in conformity with regulations issued by the Secretary that shall provide for a graduated scale of grant rates establishing higher rates for projects in communities that have lower community population and income levels.

(3) No grant shall be made under paragraph (2) of this subsection in connection with any project unless the Secretary determines that the project (i) will serve a rural area which, if such project is carried out, is not likely to decline in population below that for which the project was designed, (ii) is designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area, and (iii) is necessary for an orderly community development consistent with a

comprehensive community water, waste disposal, or other development plan of the rural area.

(4)(A) The term "development cost" means the cost of construction of a facility and the land, easements, and rights-of-way, and water rights necessary to the construction and operation of the facility.

(B) The term "project" shall include facilities providing central service or facilities serving individual properties, or both.

(5) Application requirements

Not earlier than 60 days before a preliminary application is filed for a loan under paragraph (1) or a grant under paragraph (2) for a water or waste disposal purpose, a notice of the intent of the applicant to apply for the loan or grant shall be published in a general circulation newspaper. The selection of engineers for a project design shall be done by a request for proposals by the applicant.

(6) The Secretary may make grants aggregating not to exceed $30,000,000 in any fiscal year to public bodies or such other agencies as the Secretary may determine having authority to prepare comprehensive plans for the development of water or waste disposal systems in rural areas which do not have funds available for immediate undertaking of the preparation of such plan.

(7) Definition of rural and rural areas

For the purpose of water and waste disposal grants and direct and guaranteed loans provided under paragraphs (1) and (2), the terms "rural" and "rural area" mean a city, town, or unincorporated area that has a population of no more than 10,000 inhabitants.

(8) In each instance where the Secretary receives two or more applications for financial assistance for projects that would serve substantially the same group of residents within a single rural area, and one such application is submitted by a city, town, county or other unit of general local government, he shall, in the absence of substantial reasons to the contrary, provide such assistance to such city, town, county or other unit of general local government.

(9) Conformity with State drinking water standards

No Federal funds shall be made available under this section for a water system unless the Secretary determines that the water system will make significant progress toward meeting the standards established under title XIV of the Public Health Service Act (commonly known as the "Safe Drinking Water Act") (42 U.S.C. 300f et seq.).

(10) Conformity with Federal and State water pollution control standards

No Federal funds shall be made available under this section for a water treatment discharge or waste disposal system unless the Secretary determines that the effluent from

the system conforms with applicable Federal and State water pollution control standards.

The Secretary may make grants, not to exceed $1,500,000 annually, to public bodies, private nonprofit community development corporations or entities, or such other agencies as the Secretary may select to enable the recipients—

(i) to identify and analyze business opportunities, including opportunities in export markets, that will use local rural economic and human resources;

(ii) to identify, train, and provide technical assistance to existing or prospective rural entrepreneurs and managers;

(iii) to establish business support centers and otherwise assist in the creation of new rural businesses, the development of methods of financing local businesses, and the enhancement of the capacity of local individuals and entities to engage in sound economic activities;

(iv) to conduct regional, community, and local economic development planning and coordination, and leadership development; and

(v) to establish centers for training, technology, and trade that will provide training to rural businesses in the utilization of interactive communications technologies to develop international trade opportunities and markets.

(B) Criteria

In awarding the grants, the Secretary shall consider, among other criteria to be established by the Secretary–

(i) the extent to which the applicant provides development services in the rural service area of the applicant; and

The Secretary shall ensure, to the maximum extent practicable, that assistance provided under this paragraph is coordinated with and delivered in cooperation with similar services or assistance provided to rural residents by the Cooperative State Research, Education, and Extension Service or other Federal agencies.

(D) Authorization of appropriations

There are authorized to be appropriated to carry out this paragraph $7,500,000 for each of fiscal years 1996 through 2002.

(12)(A) The Secretary shall, in cooperation with institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307 and 308), or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, establish a system for the dissemination of information and technical assistance on federally sponsored or funded programs. The system shall be for the use of institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307, and 308),

or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, and other persons concerned with rural development.

(B) The informational system developed under this paragraph shall contain all pertinent information, including, but not limited to, information contained in the Federal Procurement Data System, Federal Assistance Program Retrieval System, Catalogue of Federal Domestic Assistance, Geographic Distribution of Federal Funds, United States Census, and Code of Federal Regulations.

(C) The Secretary shall obtain from all other Federal departments and agencies comprehensive, relevant, and applicable information on programs under their jurisdiction that are operated in rural areas.

(D) Of the sums authorized to be appropriated to carry out the provisions of this chapter, not more than $1,000,000 per year may be expended to carry out the provisions of this paragraph.

(13) In the making of loans and grants for community waste disposal and water facilities under paragraphs (1) and (2) of this subsection the Secretary shall accord highest priority to the application of any municipality or other public agency (including an Indian tribe on a Federal or State reservation or other federally recognized Indian tribal group) in a rural community having a population not in excess of five thousand five hundred and which, in the case of water facility loans, has a community water supply system, where the Secretary determines that due to unanticipated diminution

or deterioration of its water supply, immediate action is needed, or in the case of waste disposal, has a community waste disposal system, where the Secretary determines that due to unanticipated occurrences the system is not adequate to the needs of the community. The Secretary shall utilize the Soil Conservation Service in rendering technical assistance to applicants under this paragraph to the extent he deems appropriate.

(14) Rural water and wastewater technical assistance and training programs

(A) In general

The Secretary may make grants to private nonprofit organizations for the purpose of enabling them to provide to associations described in paragraph (1) of this subsection technical assistance and training to—

(i) identify, and evaluate alternative solutions to, problems relating to the obtaining, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas;

(ii) prepare applications to receive financial assistance for any purpose specified in paragraph (2) of this subsection from any public or private source; and

(iii) improve the operation and maintenance practices at any existing works for the storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas.

(B) Selection priority

In selecting recipients of grants to be made under subparagraph (A), the Secretary shall give priority to private nonprofit organizations that have experience in providing the technical assistance and training described in subparagraph (A) to associations serving rural areas in which residents have low income and in which water supply systems or waste facilities are unhealthful.

(C) Funding

Not less than 1 nor more than 3 percent of any funds appropriated to carry out paragraph (2) of this subsection for any fiscal year shall be reserved for grants under subparagraph (A) unless the applications, qualifying for grants, received by the Secretary from eligible nonprofit organizations for the fiscal year total less than 1 per centum of those funds.

(15) In the case of water and waste disposal facility projects serving more than one separate rural community, the Secretary shall use the median population level and the community income level of all the separate communities to be served in applying the standards specified in paragraph (2) of this subsection and section 1927(a)(3)(A) of this title.

(16) Grants under paragraph (2) of this subsection may be used to pay the local share requirements of another Federal grant-in-aid program to the extent permitted under the law providing for such grant-in-aid program.

(17)(A) In the approval and administration of a loan made under paragraph (1) for a water or waste disposal facility, the Secretary shall consider fully any recommendation made by the loan applicant or borrower concerning the technical design and choice of materials to be used for such facility.

(B) If the Secretary determines that a design or materials, other than those that were recommended, should be used in the water or waste disposal facility, the Secretary shall provide such applicant or borrower with a comprehensive justification for such determination.

(18) In making or insuring loans or making grants under this subsection, the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this chapter.

(19) Community facilities grant program

(A) In general

The Secretary may make grants, in a total amount not to exceed $10,000,000 for any fiscal year, to associations, units of general local government, nonprofit corporations, and federally recognized Indian tribes to provide the Federal share of the cost of developing specific essential community facilities in rural areas.

(B) Federal share

(i) In general

Except as provided in clauses (ii) and (iii), the Secretary shall, by regulation, establish the amount of the Federal share of the cost of the facility under this paragraph.

(ii) Maximum amount

The amount of a grant provided under this paragraph for a facility shall not exceed 75 percent of the cost of developing the facility.

(iii) Graduated scale

The Secretary shall provide for a graduated scale for the amount of the Federal share provided under this paragraph, with higher Federal shares for facilities in communities that have lower community population and income levels, as determined by the Secretary.

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

(c) Repealed. Pub. L. 91-606, Title III, § 302(2), Dec. 31, 1970, 84 Stat. 1759

(d) Carryover of unused authorizations for appropriations

Any amounts appropriated under this section shall remain available until expended, and any amounts authorized for any fiscal year under this section but not appropriated may be appropriated for any succeeding fiscal year.

Supreme Court, U.S.
FILED
JAN 21 2000
CLERK

(2)

No. 99-1081

In The

Supreme Court of the United States

TOWN OF MULDROW, et al.,

Petitioners,

v.

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners

Town of Muldrow and the Muldrow Public Works Authority. The Muldrow Public Works Authority is a public trust, of which the Town of Muldrow is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "Town of Muldrow," and "Muldrow" are intended to encompass both Petitioners.

Respondent

Sequoyah County Rural Water District No. 7, referenced herein as "Sequoyah-7", is an agency and legally constituted authority of the state of Oklahoma (82 Oklahoma Statutes §1324.6), created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District (Title 82 Oklahoma Statutes §1324.3).

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CONSTITUTION

Art. I §8, cl. 1 1

RESPONSE TO PETITIONERS' STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Muldrow erroneously lists the U.S. Constitution, Art. I §8, cl. 1 (The Spending Clause), as being a constitutional provision involved in this case. Muldrow seeks to raise this constitutional argument for the first time within its Petition For Certiorari. However, by failing to raise this issue with the Trial Court, the Tenth Circuit on Appeal, and the Tenth Circuit within Petitioners' Motion To Reconsider, Muldrow has waived this constitutional argument. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Corp. v. Garland Coal & Mining Company*, 267 F.2d 569 (10th Cir. 1959).

RESPONSE TO STATEMENT OF THE CASE

Sequoyah-7 is an Oklahoma Rural Water District which is now, and has been at various times in the past, indebted to the Federal Government for loans obtained to develop its water distribution system. Sequoyah-7 brought this action seeking to enjoin Muldrow from selling water within its service area, and to recover damages for past water sales in violation of Title 7 U.S.C. §1926(b).

Title 7 U.S.C. §1926(b) [hereafter §1926(b)], states that water service provided or made available through an indebted water district may not be curtailed or limited by a municipality or other public body. As interpreted by the Courts, this provision prohibits a municipality or other

public body from selling water within the water district's service area during the period of its indebtedness.

Sequoyah-7 claims an exclusive right to sell to all water customers within its service area pursuant to Title 7 U.S.C. §1926(b). While it is true that Muldrow sold water to some of the customers in dispute for some time before this litigation was commenced, other customers were recently added to Muldrow's system. Sequoyah-7 has provided or made available water service to all the customers in dispute, and was selling water to some of the customers until Muldrow disconnected them from the Sequoyah-7 system and connected the customers to the Muldrow system.

The question of whether §1926(b) is an exception to the Federal Antitrust Statute or is somehow a violation of the Spending Clause has never been previously raised, or briefed by Muldrow. §1926(b) prohibits the limitation or curtailment of customer service that is provided or made available by the indebted water district. This restriction is not limited to curtailment or limitation which is accomplished through inclusion of the area served within the boundaries of a municipal corporation or the public body or the grant of any franchise for similar service, but includes curtailment or limitation of any form during the loan period.

Over the years Sequoyah-7 and its predecessors have received four federal loans. The original loans were taken out on April 14, 1969 and remained in place until *purchased* by Sequoyah-7 pursuant to the Agricultural Credit Act of 1987, on May 5, 1989. On September 28, 1994,

Sequoyah-7 obtained a Fourth Loan, on which it remains indebted today.

On June 12, 1998, the District Court granted summary judgment based on a finding that Sequoyah-7 had not made service available to the customers in dispute. A decision which was in error and has been reversed by the Tenth Circuit.

ARGUMENT FOR DENYING WRIT

The Court should deny Muldrow's Petition For Certiorari because Muldrow has failed to properly raise any issues of significant importance.

I. THE TENTH CIRCUIT'S INTERPRETATION OF §1926(b) IS CONSISTENT WITH FEDERAL LAW

The Tenth Circuit's determination that doubts about whether a water association is entitled to protection from competition under §1926(b) should be resolved in favor of the Federally indebted party seeking protection for its territory is an appropriate standard. Appellees seek to have this Court review the Tenth Circuit's decision based upon the *new* argument that §1926(b) is an exception to the Federal Antitrust Laws and therefore must be construed narrowly, an argument which Muldrow did not make to the Trial Court, the Tenth Circuit on appeal or to the Tenth Circuit in their Joint Petition For Rehearing. Because Muldrow failed to raise this argument in a timely

fashion and has thus waived this issue[1], the Supreme Court should deny the Petition For Certiorari[2].

Furthermore, the Tenth Circuit's holding that §1926(b) is to be broadly and liberally construed to fulfill its intended purposes is not a new revelation, but is consistent with every Court which has addressed this issue. The Courts have universally held that the purposes of §1926(b) are "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user costs, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996).

Section 1926(b) furthers its purposes by protecting the territory served by such associations against competitive facilities which may be developed with the expansion of municipal boundaries:

> "A new provision [section 1926(b)] has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of

---

[1] *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Corp. v. Garland Coal & Mining Company*, 267 F.2d 569 (10th Cir. 1959).

[2] Muldrow contends §1926(b) is an exception to the Federal Antitrust Statutes, without providing any facts or arguments to show that the Federal Antitrust Statutes would otherwise be applicable to Sequoyah-7, a state agency.

> municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

> "The service area of a federally indebted water association is ***sacrosanct***. Every Federal Court to have interpreted §1926(b) has concluded that the statute should be liberally interpreted to protect FmHA – indebted rural water association from municipal encroachment." (Emphasis added)

North Alamo Water Supply v. City of San Juan, Texas, 90 F.3d 910, 915 (5th Cir. 1996).

The Courts, which have addressed §1926(b), make it clear that the statute should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems, whatever form the competition may take:

> "The legislative history of 7 U.S.C. § 1926(b) provides additional guidance on the scope of the statutory prohibition. Referring to 1961 revisions in the federal water loan program, the Senate Report explained:
>
> > This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision [section 1926(b)] has

> been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system. S.Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin. News 2243, 2309.
>
> The clear message of the three federal cases applying 7 U.S.C. §1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically by annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 424-425 (S.D. Ind. 1988), *affirmed*, 895 F.2d 311 (7th Cir. 1989).

A municipality is simply not allowed to encroach upon the services provided by a Rural Water District ***by any means***, including condemnation:

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us

> do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of §1926(b).

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987); see also *Glenpool Utility Services v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988); and *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D. Miss. 1986).

In addition, §1926(b) is a statute which was enacted to protect a *"public interest,"* and statutes enacted for such purpose are to be interpreted broadly:

> The doctrine of equitable estoppel, like other principles of equity, will be applied flexibly by a federal court to achieve fairness and avoid injustice. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59, 104 S. Ct. 2218, 2223, 91 L. Ed. 2d 42, 51 *(1984). However, equitable estoppel cannot apply to block the application of a statute enacted to protect the public interest. Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 257, 66 S.Ct. 101, 105, 90 L.Ed. 47, 52 (1945).
>
> * * *
>
> *The Court finds that the purposes of 7 U.S.C. §1926(b) are to encourage rural water development and to safeguard the interest of the United States in having its loans repaid – both purposes aimed at promoting the public interest – rather than merely to protect the private interest of a rural water association.* See *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987); S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309. If Jennings were estopped

from invoking the statute in this action, the result would be that North Vernon would sell water to CSL – a result that would totally violate the statutory proscription of municipal encroachment on a rural water association's service. Thus, even if CSL's allegations about Jennings' conduct are true, because as a matter of law estoppel cannot be invoked to subvert the application of a statute enacted in the public interest, CSL's motion for summary judgment must be denied.

This analysis is consistent with cases holding that a private party may not waive the operation of a statute enacted to benefit the public interest. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740, 101 S.Ct. 1437, 1445, 67 L.Ed.2d 641, 653 (1981); *Brooklyn Savings Bank v. O'Neil*, 325 U.S. 697, 704, 65 S.Ct. 895, 900-01, 89 L.Ed. 1296, 1307 (1945) (*"a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy"*); *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 360-61, 64 S.Ct. 128, 130-131, 88 L.Ed. 96, 101 (1943); *Millmaster Int'l, Inc. v. United States*, 427 F.2d 811, 814 (C.C.P.A.) ("A party may not waive a right granted to further a legislative policy in the public interest as manifested in the statute or its legislative history if the waiver would thwart the statutory purpose"), *modified*, 429 F.2d 985 (C.C.P.A. 1970). As noted above, 7 U.S.C. §1926(b) was enacted to benefit the public interest. Therefore, *just as Jennings could not have voluntarily waived the polication of the statute and authorized North Vernon to violate an act of Congress*, the same result cannot be achieved by estoppel. (Emphasis added)

Jennings Water, Inc. v. City of North Vernon, Indiana, 682 F.Supp. 421 (S.D. Ind. 1988), *affirmed*, 895 F.2d 311 (7th Cir. 1989).

In *Midstate Horticultural*, the court was addressing whether a party, by agreement, could waive a three year statute of limitation period provided by the Interstate Commerce Act. The parties, before the statute of limitation had run, entered into a formal written agreement that the Defendant would not raise the defense of statute of limitations should the parties fail to settle their disputes and litigation be subsequently brought. After the running of the statute of limitations, the Plaintiff brought suit and the Defendant asserted the statute of limitation notwithstanding their prior agreement. The Court in that case held that the agreement not to raise the statute of limitations was *"invalid as being contrary to the intent and effect of the section and the Act"*. *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 64 S.Ct. 128, at p. 130, 88 L.Ed 96 (1943).

In this case (as reflected by the *Jennings* decision) the rights provided by Title 7 U.S.C. §1926(b) are rights granted to Sequoyah-7 in the public interest and to effectuate a legislative policy to ensure repayment to the FmHA and to ensure rural water customers safe, clean water, and the statute should be read broadly to protect these interests.

Antitrust legislation is given broad interpretation (and exceptions narrow interpretation) because Antitrust legislation is *"remedial"*:

> "Because the Act is remedial, it is to be construed broadly to effectuate its purposes".

Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1, 12, 96 S.Ct. 1305 (1975).

§1926(b), as a "public interest" statute, is likewise *remedial* legislation, which seeks to protect the rural water districts, the customers of the districts, and Federal Government loans, as well as promoting public health and welfare by assuring an adequate, clean water supply for rural residents. §1926(b) itself must be construed broadly to effectuate its intended purposes.

II. THE TENTH CIRCUIT IS ENFORCING THE PLAIN MEANING OF § 1926(b) AS TO PRE-EXISTING CUSTOMERS OF A MUNICIPALITY, WHERE SUCH CUSTOMERS ARE WITHIN THE INDEBTED WATER DISTRICT'S SERVICE AREA, AND FOR WHICH THE NEWLY INDEBTED WATER DISTRICT IS MAKING SERVICE AVAILABLE.

Muldrow's argument that enforcement of §1926(b) violates the constitution of the United States was not raised before the District Court or the Tenth Circuit. This argument has been waived. *Walters v. City of St. Louis, Mo.,* 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller,* 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Company v. Garland Coal & Mining Company,* 267 F.2d 569 (10th Cir. 1959).

Muldrow argues that the Tenth Circuit has effected a "taking of municipality owned water-service infrastructure". This is not the case. The infrastructure remains the property of Muldrow. Muldrow simply cannot sell water

to customers within the "service area" of the water district during the period of its indebtedness[3].

§1926(b) does not create an exception to permit a city to sell water within the service area of a water district following the time the district obtains a Federal loan. The statute, with its recognized purpose of expanding the number of customers of an indebted water district, plainly states that service made available by the association "shall not be curtailed or limited, . . . during the term of such loan". If the water district has made service available to a pre-existing customer of a municipality and the customer is located within the water district service area after becoming indebted, the statute grants the indebted water district the exclusive right to sell water to that customer *during the life of the loan*. The Tenth Circuit's ruling merely references the plain reading of the statute.

III. THE TENTH CIRCUIT CORRECTLY HELD THAT SEQUOYAH-7 MAY RECOVER DAMAGES FOR §1926(b) VIOLATIONS WHICH OCCURRED DURING A PRIOR LOAN

There is no dispute that Sequoyah-7 was indebted to the FmHA for the period April 14, 1969 to May 4, 1989. Muldrow has raised the argument that when Sequoyah-7

---

[3] Sequoyah-7 has requested that Muldrow forfeit its water lines constructed to sell water in violation of §1926(b). However, the case law on this subject would require Sequoyah-7 to pay the unrecouped cost of such lines. *North Alamo*, at p. 919. The Tenth Circuit did not rule on this issue, but left creation of an appropriate remedy to the District Court on remand. Petitioners' Appendix at p. 3a, footnote 3.

purchased its notes on May 4, 1989, the extinguishment of debt also extinguished Sequoyah-7's §1926(b) existing claims, prohibiting Sequoyah-7 from obtaining damages caused by Muldrow's encroachment during the period between April 14, 1969 and May 4, 1989. Muldrow's argument is unsupported by any case law or other legal principal, and should be rejected by the Court.

CONCLUSION

Based upon the arguments and authorities presented, the Petition should be denied.

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Supreme Court, U.S.
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No. 99-1081

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION TO INTERVENE AS AMICUS CURIAE

COMES NOW The City of Broken Arrow, Oklahoma, The City of Holdenville, Oklahoma, the City of Okmulgee, Oklahoma, the City of Stillwater, Oklahoma, the City of Ponca City, Oklahoma, and the organizations of the National League of Cities and the Oklahoma Municipal League, and request permission to file the attached "RESPONSE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI". The Tenth Circuit Court of Appeals has rendered a decision that interprets a statute, which affects all of the Amici Curiae and has constitutional implications that impact the operations of these and other cities. The two listed organizations are associations, which directly serve cities on the national and state levels, and are concerned that the issues of this case, are certain to reoccur. Unless the issues are fully addressed, the proposed Amici Curiae will have to repeatedly relitigate the identical issues, because the construction of law used by the Tenth Circuit directly addresses Fifth Amendment due process and Tenth Amendment reservation of powers issues which these entities are not prepared to waive.

Although the parties have framed the questions for presentation on appeal, the proposed Amici Curiae believe that they can bring relevant matter to the attention of the Court, which will not be fully addressed by the parties in the absence of the proposed participation. Counsel for Petitioners Town of Muldrow, et al., has consented to the participation by these entities. Counsel for Respondents Sequoyah County Rural Water District No. 7 has acknowledged that this case is drawing national attention, but has further stated that they will refuse to consent to any participation by any Amici Curiae.

WHEREFORE, the above cities and associations request permissions to participate as Amici Curiae in this case.

Respectfully Submitted,

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CITY OF BROKEN ARROW
NATIONAL LEAGUE OF CITIES
OKLAHOMA MUNICIPAL LEAGUE
CITY OF STILLWATER
CITY OF HOLDENVILLE
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ARGUMENT FOR GRANTING WRIT

The Court should grant certiorari in this case because 7 U.S.C. § 1926(b), as construed by the Tenth Circuit, substantially exceeds the power of Congress under the Spending Clause, the Tenth Amendment and the Fifth Amendment. There is a need for the Court to retrieve the actual language of Section 1926(b) from a tangled web of deviations and extrapolations, which courts have used as a substitute for the express words of Section 1926(b). This development has led to a split in the circuits.

Section 1926(b) is enacted under the Spending Clause as part of a federal loan program, which was aimed at developing water services in rural areas. The Tenth Circuit has extended the sweep of this statute by regulating the State of Oklahoma as to its policy for its internal development, its empowerment of intra-state water providers, and its enforcement of the powers conferred on its municipalities by Oklahoma's Constitution. OK. Const. Art XVIII, § 6. The Tenth Circuit did this by exposing Cities to liability during periods 1) prior to the existence of a federal loan and 2) after all federal loans have been paid in full. Such an enlargement of federal power exceeds the limits of the Spending Clause, deprives Cities of basic due process of law under the Fifth Amendment, and is at odds with the Tenth Amendment.

The Tenth Circuit's construction of Section 1926(b) is based on a complete deviation from express statutory language, and is grounded on a mistaken understanding of congressional intent as set out in Section 1926(a)(1). The Tenth Circuit, following the lead of the Fifth Circuit, reads into the statute a prohibition of "encroachment," which expands the meaning of Congress' language beyond its intent and beyond constitutional bounds. Although the statute states

that it applies "during the term of such loan," the Tenth Circuit finds "encroachment" from water service the Town provided before the loan originated. The Tenth Circuit continues to find "encroachment" from water service the Town of Muldrow provided after the federal loan was satisfied, and therefore after all federal interest in the situation had ceased. The resulting application of Section 1926(b) is not viable under the Spending Clause, or the Fifth Amendment, or the Tenth Amendment.

Enforcement of Section 1926(b) based on such a construction divests the Town of its vested rights and effects a taking of the Town's water distribution system and revenues without notice and without compensation. This is contrary to the Fifth Amendment. It is also contrary to the specific purposes of the water loan program for developing water services in rural areas. 7 U.S.C. § 1926(a)(1).

ARGUMENT 1

The Tenth Circuit's construction of Section 1926(b) pushes the statute beyond the powers of Congress under the Spending Clause and the Tenth Amendment.

During a period when the current borrower did not have a federal loan, the Town of Muldrow extended service to certain areas and customers situated in territory now claimed by the borrower. The borrower (Water District) subsequently initiated an FmHA loan in 1994, without notice to the Town of Muldrow or to the customers of their service. On that basis, the borrower asserts that Section 1926(b) must be applied retroactively to prohibit the Town from continuing its existing service.

Section 1926(b) is an exercise of congressional power under the Spending Clause. U.S. Const. art. 1 § 8, cl. 1. The spending clause does not confer power to regulate. *Hoke v. United States,* 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (1913). It merely empowers Congress to spend for purposes delegated to the federal government. *United States v. Butler,* 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936). Congress may not impose conditions unrelated to those delegated powers. *Steward Mach. Co. v. Davis,* 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).

The federal purpose of Section 1926(b) is to protect the federal government's interest in collateral pledged by borrowers under the loan program established in 7 U.S.C. § 1926. The statute expresses this purpose in clear, unambiguous language:

> Curtailment or limitation of service prohibited. The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (Emphasis added.)

This restriction is a condition attached to loans made by the federal government through the Farmers' Home

Administration (now renamed as the Rural Utilities Service). *Glenpool Utility Services Authority v. Creek County Rural Water District No. 2,* 861 P.2d 1211 (10th Cir. 1988). The purpose of the loan program is to fund water extension into rural areas that otherwise would not have access to a public water supply system. 7 U.S.C. § 1926(a)(1). Thus, Congress has provided funding for services traditionally within the ambit of State policy-making. Congress did not expressly authorize the transfer of existing water customers from one provider to the new borrower. Such a borrower's legal existence, authority to engage in water service and right to a service territory derives solely from State law.

The federal loan is intended to build infrastructure for the primary benefit of rural residents 7 U.S.C. §1926(a). Facilities funded by the loan and revenues produced by operation of the facilities are pledged as collateral for the loan. *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.,* 103 F.3d 38, 42 (6th Cir. 1996), *cert. denied, 521 U.S. 1111* (1997).

The sole purpose of §1926(b) is to protect the federal lender's interest in the collateral during the life of the loan. *Id. See also, Lexington-South Elkhorn Water Dist. v. City of Wilmore,* 93 F.3d 230, 234 (6th Cir. 1996). It does so by preventing municipalities from using their governmental powers of regulation, licensing or franchising to interfere with the viability of the collateral within their boundaries. *City of Madison, Miss. v. Bear Creek Water Association, Inc.,* 816 F. 2d 1057, 1059 (5th Cir. 1987). In order for Congress to restrict public bodies created by the State from exercising certain of their governmental powers, such restrictions must be closely tied to the federal purpose of protecting collateral pledged to the federal loan. *Bell Arthur Water Corporation*

v. Greenville Utilities Commission, 972 F.Supp. 951 (E.D. N.C. 1997).

The Tenth Circuit holds that, when a borrower acquires a loan protected by Section 1926(b), the Town is prevented from continuing to serve customers, which it legally acquired when no federal loan – and so, no collateral – existed. Further, this prohibition is imposed without notice or opportunity to the Town to defend its property or services. Also no notice is provided to the customers. The Tenth Circuit thus transforms Section 1926(b) into a peremptory designation of service territory. By protecting borrowers against preexisting water providers, the Tenth Circuit also reconfigures the statute into a peremptory designation of service providers.

If the Town provided water service under authority of State law at a time when there was no federal indebtedness to trigger Section 1926(b), there is no federal purpose to apply Section 1926(b) to shield a subsequent loan from competing water suppliers. Where rural areas already enjoy adequate, affordable water service from the Town prior to the borrower's loan, those areas are not included in the class for which the federal loan program was created; therefore, as applied to them, there is no federal purpose for the exercise of power under the Spending Clause. The Tenth Circuit's use of Section 1926(b) to oust the Town's preexisting service inserts it into the sphere of powers reserved by the States under the Tenth Amendment.

The Oklahoma Constitution empowers the Town to extend water service throughout its corporate limits. OK. Const. art XVIII, § 6. State law confers on the Town authority to serve outside its boundaries at its discretion. 11 O.S. §§ 22-104 and 37-102. The State's policy regarding

water service is integrally tied to its broader plans for economic development, land use, managed growth, citizen empowerment and quality of life issues. Water availability affects the effectiveness and efficiency of many governmental policies: fire protection, sewer and wastewater treatment, water resource development and environmental protection, to name a few. Cities and Towns are local units of general government, whereas Water Districts have very limited powers and cannot provide the range of services as are provided by municipalities. The State must be concerned that services are delivered uniformly and without wasteful duplication of expenditures for infrastructure, particularly in urban or urbanizing areas. State policy on many utility issues is established directly by the State Constitution itself.

The Tenth Circuit has converted Section 1926(b) into a regulatory statute in derogation of this State power. Under the Tenth Circuit's holding, Section 1926(b) is not limited to protecting federal loan collateral but is expanded to protect the borrower itself. Shielding the borrower beyond the protection of its collateral inserts the federal government into State affairs. The Tenth Amendment bars such regulation of the States. There is no federal power to protect the borrower (who is a creature of the State) from the dictates of State law in the absence of a federal spending purpose. U.S. CONST., amend. X.

It is noteworthy that the statute on its face does not purport to protect the borrower. "The purpose of Section 1926(b) is not to protect a rural water association at all costs . . ." *Rural Water System No. 1 v. City of Sioux Center*, 967 F.Supp. 1483, 1520 (N.D. Iowa 1997). In fact, it only protects the federal government by securing the potential of the funded facilities to repay the loan. There is no federal purpose in disrupting State-authorized water service to

existing customers in order to loan money to a different provider to build a duplicative system to serve those same customers. Such creation of service rights and territory is a State regulatory matter. Further, there is no federal purpose in disrupting State-authorized water service at a time when no federal loan exists. The statutory language "during the term of the loan" becomes meaningless under the Tenth Circuit's interpretation that the statute protects a borrower before the loan existed and after the loan has been repaid.

This Court should grant certiorari in order to return the construction of Section 1926(b) to the purposes permitted by the Spending Clause. There is a need for the Court to address the restricted uses of Section 1926(b) under the Tenth Amendment.

ARGUMENT 2

Section 1926(b) must be construed within the bounds of its express statutory language and must advance the federal purpose of Section 1926(a) under the facts and circumstances of each case.

When Respondent obtained its loan from Farmers Home Administration in 1994, it did not have an exclusive service territory under State law. *Comanche County Rural Water District No. 1 v. City of Lawton,* 501 P.2d 490 (Okla. 1972). Respondent now claims that Section 1926(b) gives it an exclusive right to provide water service within its area. It further asserts a right to relief from any activity of the Town to selling or continuing to sell water within the area. These claims are not supported by the plain language of the statute.

Section 1926(b) is merely a loan condition, for so it must be characterized under the Spending Clause. Unfortunately, the extant case law broadens the sweep of the statute without regard to the actual words used. Thus it is said variously that Section 1926(b) is "intended to protect rural water districts from competition . . ."; "to assist in protecting the territory served by such an association facility against competitive facilities . . ."; "to protect FmHA-indebted rural water associations from municipal encroachments." "The service area of a federally indebted water association is sacrosanct." See discussion and citations at Appendix A, pp. 8a-9a.

These judicial statements belie a too-narrow view of the world of water service, which is not supported by the federal program itself. Of course, rural water associations are not the sole intended beneficiaries of Section 1926(b) because municipalities are also eligible borrowers under Section 1926(a)(1). More to the point, the statute does not forbid all competition. A private water company may engage in the business of selling water in the debtor's territory, if state law does not require a franchise. A municipality may sell water in the debtor's service area, if it is authorized by State law to extend water operations outside its boundaries. Section 1926(b) as written does not in fact make the federal debtor's service area sacrosanct.

Section 1926(b) merely prohibits the use of governmental power to put the borrower at a competitive disadvantage. The forbidden actions are all regulatory powers uniquely belonging to government: restricting debtor's ability to serve as the result of annexation; granting a franchise; subjecting the debtor to local government regulation through franchise, license or permit requirements. Section 1926(b) as written does not curtail the authority of municipalities and other public bodies to simply compete with

the debtor as a water provider in the same manner as a private water company. Section 1926(b) as written does not prohibit business "encroachment" (competition) by public bodies, merely their use of governmental powers to prevent the debtor from doing business within its service area.

Section 1926(b) does not protect territory. It only protects service that the debtor has already "provided or made available." The statute uses the past tense. It estops the use of governmental power to curtail or limit service from facilities that have already been built. Section 1926(b) does not guarantee federal borrowers that other water providers will be barred from serving rural areas under all circumstances.

In addition, when a FmHA borrower cannot provide facilities to serve an area within a reasonable time, a municipality may extend its service to the area. *Lexington-South Elkhorn Water Dist. v. City of Wilmore, supra* at page 234. If a borrower has failed to bring its facilities within a reasonable distance of a rural area prior to the time that another provider extends its service, the borrower cannot claim Section 1926(b) protection. *Id.*, at page 237.

The Spending Clause requires these results. The constitutional justification for subjecting the Town to Section 1926(b)'s imposition of federal power must be found in: (1) Section 1926(a)'s purpose to provide water service in rural areas; and (2) the separate purpose of Section 1926(b) to protect the collateral for the FmHA loan. *United States v. Butler, supra*. It is alleged that: (1) Respondent does not have facilities within a reasonable distance of some of the disputed customers; and (2) Respondent's facilities are not adequate to deliver the quantity or pressure of water required by some of them.

The federal purpose of bringing water service to rural areas is thwarted if water is not in fact delivered in real time and in sufficient quantities to actually meet the water needs of an area not previously served. The loan program exists to provide for, *inter alia,* " . . . the conservation, development, use, and control of water . . . *and essential community facilities* . . . all primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents . . . " (Emphasis added) 7 U.S.C. § 1926(a)(1).

A primary need for rural water use is adequate facilities to produce sufficient pressure for fire protection. Yet, the Tenth Circuit includes a footnote "for remand purposes" that some courts have found that fire protection is not a purpose of Section 1926(b). [Appendix A, p. 26a, fn. 10.] This begs the question. Use of water to serve rural residents is a purpose of Section 1926(a)(1). In reality, insurance companies will not insure rural property, including farmers' or ranchers' homes or rural businesses, if the rural area does not have adequate water pressure for fire protection. Those same farmers, ranchers or rural businesses cannot obtain mortgages if they cannot secure insurance.

The purpose of the federal loan program is to encourage the development of rural areas. In some circumstances, commercial and industrial properties will try to develop in these areas. Due to the congregation of people in the commercial areas and due to the presence of industrial chemicals or flammable materials used in industrial processes, fire protection becomes critical. The use and availability of water facilities for fire protection is, therefore, a purpose of Section 1926(a), which funds all "essential community facilities." The statutory language "provided or made available" requires tangible results for the rural resident. If Respondent failed to provide such results before the Town

made its capital investment to fill the void, then it had not "provided or made available" any service protected by Section 1926(b). *CSL Utilities Inc., v. Jennings Water, Inc.*, 16 F3d 130 (7th Cir. 1993) *cert. denied,* 513 U.S. 812 (1994).

The Section 1926(b) protections cannot be used to "totally freeze water utility development within the indebted association's service area." *CSL Utilities, Inc. v. Jennings Water, Inc., supra.* Federal power to protect its debtors depends on the federal purpose of protecting its collateral. Where the borrower has failed to provide water service in its territory, there is no collateral. Therefore, there is no federal purpose. *Bell Arthur Water Corporation v. Greenville Utilities Commission, supra.* The federal purpose having dropped away, there can be no proper exercise of the spending power as applied to the facts of this case. The Tenth Circuit places Section 1926(b) at odds with the Spending Clause.

The Court should grant certiorari to provide the proper construction of the express language of Section 1926(b) and to clarify that its protections are dependent on actual use of the federal funds for the federal purposes. There is a need for the Court to clarify that the loan purposes set out in Section 1926(a)(1) define the scope of services, which must be considered in determining whether service is provided or made available to rural communities.

ARGUMENT 3

The purpose served by any enforcement of Section 1926(b) protections must fall within the ambit of federal power.

By viewing territory – exclusive service territory – as the purpose of Section 1926(b), the Tenth Circuit moves the statute beyond the pale of the Spending Clause. The Tenth Circuit subjects the Town to divestiture of its water service by the mere fact that Respondent received a Farmers Home Administration loan years after the Town began its service. Such divestiture is done to the Town without notice and a meaningful opportunity to defend.

Respondent's existing Section 1926 loan was undertaken on September 28, 1994. It had not had a loan since May 5, 1989. In this hiatus, the Town annexed areas and lawfully extended water service under the authority of State law to customers situated within Respondent's territory. There were no competition protections in place because the Respondent was not indebted to the federal government.

On that basis, the Town made a capital investment and exercised its rights under State law to extend water service both within and without its boundaries. Muldrow has a population of nearly 2900. It is small enough to qualify as a borrower under Section 1926(a). Municipalities like Muldrow commonly depend on their infrastructure investment to further both governmental and proprietary policies. Especially for small communities with a small tax base, loss of infrastructure investment is not easily absorbed.

The Tenth Circuit now finds that Section 1926(b) can retroactively force the Town to forfeit the value of its

investment. The Tenth Circuit decision does not even provide for compensation for the Town's capital investment. Even when there is no federal loan to trigger Section 1926(b), the Tenth Circuit insists that a legitimate municipal activity is an "encroachment". A subsequent loan somehow retroactively converts the otherwise legitimate activity into an actionable invasion of the borrower's territory.

> In addition, although Plaintiff [Respondent] cannot seek relief for *encroachments* occurring between May 5, 1989, and September 28, 1994, *because it was not indebted to the FmHA during that period,* we must still examine whether Plaintiff has established genuine issues of material fact concerning whether it made service available to the customers which Defendants [the Town] began serving during that period. We undertake this inquiry for purposes of determining whether Plaintiff may seek relief for *encroachments* that continued beyond the date of the 1994 loan. (Emphasis added) [Appendix A, at p. 19a-20a.]

Thus, the Tenth Circuit applies Section 1926(b) to take existing customers away from the Town and reserve them to the Respondent even though: (1) the Town is currently serving customers in the area under authority of state law; (2) Respondent has never served them; (3) at the time the Town initiated service, Respondent had no federal loan or other basis for an exclusive claim to serve them; (4) the individual customers will be forced to switch from their existing service to Respondent's facilities and bear the cost of making Respondent's duplicate service available; and (5) Respondent has no duty to serve these customers.

This result is not viable under the Spending Clause. Where the federal spending purpose is to obtain water service for rural areas, those areas already receiving service fall outside the class that the federal loan program intends to aid. On the other hand, if a loan recipient has failed to make service available, the federal purpose is advanced if another water provider extends service to the area. The area will not be served at all if that alternate provider will be divested of its investment by a subsequent loan.

The federal goal of 1926(b) is water service for rural residents and businesses, thereby creating rural economic development. If this Tenth Circuit retroactive standard is allowed to stand, rural development as happened surrounding the small town of Muldrow will not take place. In reality, no responsible public water provider will make an investment that is subject to forfeiture by federal law.

Where water service is already available to a rural area, there is no reasonable purpose under Section 1926 to loan federal money to some other entity to provide the same or perhaps a lesser service. At a minimum, the entity providing existing service should have notice and a reasonable opportunity to defend, prior to the federal agency using a loan closing to divest the Town of its property and its customers. Certainly, it is not reasonable to require customers already receiving water service to pay the capitol costs for a new provider to make a duplicative service available to them. For that reason, there is no federal interest in including them as collateral for a loan. *Rural Water System No. 1 v. City of Sioux Center*, supra.

Indeed, the protections of Section 1926(b) exist only "during the term of such loan." Absent those federal restrictions, a municipality has authority under State law to

provide water service within and without its boundaries. Ok. Const. art. 18 § 6; 11 O.S.1991 §§22-104 and 37-102. In this case, the rural residents already have adequate service from the Town. It is obvious that pre-existing municipal water service to territory assigned by state law, does not occur during the life of the loan, when an entity becomes a FmHA borrower. The Town's existing customers, who were served by a municipal water system at the time of the loan, could not properly have been considered as part of the loan collateral.

Under the facts of this case, the Town's continued service does not impair any legitimate loan collateral. The legal viability of Section 1926(b) depends on the federal interest. *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc., supra.* Where the federal interest in the loan collateral is not involved, Section 1926(b) cannot constitutionally apply. To apply it as the Tenth Circuit does, without a federal interest, exceed the limitations of the Spending Clause.

The Tenth Circuit attempts to avoid this result by transforming Section 1926(b) into an exclusive assignment of territory by the federal government. Under this view, the statute ousts the Town from Respondent's service areas even though the Town already provides those areas with adequate and affordable water service. The only result accomplished by applying Section 1926(b) in this case is to wastefully substitute water providers, through the duplication of the infrastructure.

If Section 1926(b) is wielded to cut off the Town's continuing service to the disputed areas, it becomes a mechanism for federally created extortion. Unless the Town buys back from the Respondent the right to serve its own

customers, federal law retroactively divests the Town of an existing revenue stream and the benefit of its capital investment in its water system. A remedy actually proposed in this case would have compelled the transfer of ownership of the Town's preexisting water lines to the Respondent, in order to give Respondent the ability to take over the service the Town currently provides!

Prohibiting the Town from continuing its water operations deprives it of the value of its publicly financed system. To oust a legitimate water service system from areas it already serves in favor of an alternate system is confiscatory. This is an appropriation of Muldrow's property without "just compensation." U.S. Const. amend. V. The protections of the Fifth Amendment extend to States and their subdivisions. See *United States v. Carmack,* 329 U.S. 230, 242 (1946), *reh'g denied,* 329 U.S. 834 (1947). Therefore, there is no federal power to impose loan conditions in the manner attributed to Section 1926(b), and the Tenth Circuit's statutory construction is in violation of the federal constitution.

Because enforcement of Section 1926(b) against the Town does not advance the purpose of the federal program under these facts and circumstances, it is not a valid exercise of federal power as applied to this case. The Court should grant certiorari to establish that Section 1926(b) cannot be applied to oust a public water provider legally serving the area prior to the date of the federal loan.

CONCLUSION

Your Amici Curiae respectfully request the Court to grant certiorari to return judicial application of 7 U.S.C.

Section 1926(b) to the ambit of congressional power under the Spending Clause. By correcting the self-perpetuating interpretive errors and by conforming the statute to the Tenth Amendment, this Court will preserve the constitutional balance required by federalism. By requiring compliance with the Fifth Amendment, this Court will restore due process.

Respectfully Submitted,

CITY OF BROKEN ARROW
OKLAHOMA MUNICIPAL LEAGUE

/s/_____
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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed June 12, 1998]

No. 97-578-S

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, *Plaintiff*,	)
v.	)
TOWN OF MULDROW, an Oklahoma town and the MULDROW PUBLIC WORKS AUTHORITY, a public trust, *Defendants*.	)

ORDER

The following motions are before the court for its consideration: (1) Plaintiff Sequoyah County Rural Water District 7's motion for partial summary judgment, (2) Defendant Town of Muldrow's motion for partial summary judgment, and (3) Defendant Town of Muldrow's motion to dismiss state law claims. Plaintiff Sequoyah County Rural

Water District No. 7 ("Sequoyah-7") filed this action against Defendants Town of Muldrow and Muldrow Public Works Authority (collectively referred to as "Muldrow") seeking to enforce the provisions of 7 U.S.C. § 1926(b), which allows federally indebted rural water associations to service their territories free from the competition of municipalities. Sequoyah-7 claims Muldrow has violated § 1926(b) by selling water within Sequoyah-7's territory. Sequoyah-7 seeks to enforce the provisions of § 1926(b) by invoking the enforcement provisions of 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202. Sequoyah-7 seeks declaratory and injunctive relief, as well as damages for Muldrow's past sales of water. The parties have fully briefed the issues necessary for the resolution of § 1926(b) liability.[1] Based on the foregoing reasons, the court finds the issues in favor of Muldrow and grants its motion for partial summary judgment. Sequoyah-7's motion for partial summary judgment is denied.[2]

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[1] This parties have submitted this matter for resolution on their respective briefs. At the pretrial conference, it was agreed that a trial on the issue of damages would be necessary only if the court held in favor of Sequoyah-7 on its § 1926(b) claims.

[2] Muldrow's motion to dismiss Sequoyah-7's state law claims is moot. In its motion to dismiss, Muldrow sought the dismissal of Counts 6, 7, and 8. By stipulation of dismissal dated February 23, 1998, the parties dismissed without prejudice Counts 4, 5, 6, and 7. Thus, the only remaining Count related to Muldrow's motion to dismiss is Count 8 - a request that the court declare all water lines and facilities constructed by Muldrow to serve residents within Sequoyah-7's territory be held in trust for the use and benefit of Sequoyah-7. Given the court's rejection of Sequoyah-7's legal arguments for a § 1926(b) violation, the attendant claim in Count

BACKGROUND

Sequoyah-7 is an agency and legally constituted authority of the State of Oklahoma created for the purpose of developing and providing an adequate water supply to serve and meet the needs of rural residents within Sequoyah-7's territory. Muldrow owns and operates a water production plant and water distribution system within the Town of Muldrow. In March 1991, Sequoyah-7 was established as a public nonprofit rural water district. The history of Sequoyah-7, however, can be traced back to October 18, 1966, when the Board of County Commissioners of Sequoyah County, Oklahoma, declared certain lands to be incorporated and organized as Rural Water District No. 4, Sequoyah County, Oklahoma ("Sequoyah-4"). The area incorporated into Sequoyah-4 in 1966 included the areas which are now in dispute in the present controversy between Sequoyah-7 and Muldrow. In 1969, all assets and liabilities of Sequoyah-4 were assigned to the Rural Water Corporation ("RWC") and Sequoyah-4 was dissolved. RWC was formed as a nonprofit corporation, in part, to provide a waterworks and distribution for the and benefit of its rural system use water consumers. In March 1991, Sequoyah-7 was created and all assets and liabilities of RWC were transferred to Sequoyah-7.

Shortly after it was created in 1969, RWC began to borrow funds from the FmHA to construct certain water system facilities. RWC would eventually become obligated

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8 for a constructive trust has no merit. Thus, the court's ruling in favor of Muldrow on the motion for partial summary judgment related to the § 1926(b) claims likewise resolves Count 8 in favor of Muldrow.

to the Farmers Home Administration ("FmHA") on three notes - an April 14, 1969, note for $384,000, a June 9, 1970, note for $45,500, and a July 15, 1981, note for $388,000. In May 1989, RWC participated in a program enacted under the Agricultural Credit Act of 1987 whereby bond issuers such as RWC could buy back their government debt at a discounted rate. As a result, RWC borrowed funds from the National Bank for Cooperatives ("NBC") and purchased or paid off its outstanding indebtedness to the FmHA on May 5, 1989. All promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA." As part of the conversion process, RWC transferred to Sequoyah-7 its obligations to NBC. Sequoyah-7 remains indebted to NBC on the notes issued in favor of NBC. On September 28, 1994, Sequoyah-7 borrowed $331,400 from the FmHA to fund the construction of the "Redline" project and pump station. Sequoyah-7 remains indebted to the FmHA on the September 28, 1994, loan.

During the period of time RWC remained indebted to the FmHA April 14, 1969, to May 5, 1989 - Muldrow began selling water to customers within the territory claimed by Sequoyah-7 as its service area. Muldrow began selling to customers within the Gunter Ridge Addition and to The Gold Crown Motel f/k/a Diana Motel during this time period. After RWC paid off its loans on May 5, 1989, but before Sequoyah-7 became indebted to the Fm/HA on September 28, 1994, Muldrow began providing water service to the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Addition

Lot 2, Diana Click location number 293684/293733

Lot 13, Michael Schroeder, location number 293667

Lot 14, Kevin Hauger, location number 293678

FWCC Trucking location number 820138

J.D. Hill, location number 820127

Laster Realty Co., location number 839861

Rasamy Mangboupha, location number 820149

Doug Harvell, location number 820182

After Sequoyah-7 became indebted to the FmHA on September 28, 1994, Muldrow added the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Phase I

Lot 1, Robert Powell
Lot 3, Twila McElhaney
Lot 4, Denny Sossemen
Lot 5, Gary Carmen
Lot 6, Clinton Rice
Lot 7, Denise & Lee Boyers

Lot 8, Henry Davis
Lot 9, Dane Leathem
Lot 10, Anthony Bowers
Lot 11, Donna Marion
Lot 12, Dennis Shryrock

Food Plus/Dollar General Store, location number 816937

Bob Prewitt Property (John Bogner), location number 817806

FWCC Trucking office, location number 819929

OK Industries (a/k/a OK Foods), location number 816893

J.D. Hill Truckwash, location number 820166

With respect to all of these customers, it is Sequoyah-7's position that Muldrow has violated § 1926(b) because it has sold water within Sequoyah-7's established territory.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 247-48 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of fact. Celotex v. Catrett, 477 U.S. 317, 325 (1986). If this initial burden is satisfied, the nonmoving party then has the burden of coming forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party cannot rest on the mere allegations of the pleadings, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which [it] carries the burden of proof." Applied Genetics v. First Affiliated Securities, 912 F.2d 1238, 1241 (10th Cir. 1990).

"A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Thomas v. IBM, 48 F.3d 478, 486 (10th Cir. 1995) (quoting Anderson, 477 U.S. at 248). In this regard, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). This court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. With these standards in mind, the court turns to the merits of parties' motions.

The central issue in this case is whether Muldrow has violated the statutory protections afforded Sequoyah-7 under

§ 1926(b) by selling water to consumers within Sequoyah-7's alleged territory.[3] Section 1926(b) is part of the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* ("the Act"). The Act authorizes the Secretary of Agriculture to make or insure loans to associations for a variety of reasons, including the "conservation, development, use, and control of water." 7 U.S.C. § 1926(a) (1). Section 1926(b) of the Act provides in pertinent part:

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any

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[3] As a preliminary matter, the court's jurisdiction over this controversy must be addressed. The language of § 1926(b) does not contain an enforcement mechanism. Nor does § 1926(b) contain language creating a private right of action. Courts which have addressed § 1926(b) claims have, however, permitted suits to be brought pursuant to the authority of 42 U.S.C. § 1983 for enforcement of § 1926(b) rights. Wayne v. Village of Sebring, 36 F.3d 517, 528-29 (6th Cir. 1994), cert. denied, 514 U.S. 1127 (1995); Rural Water System #1 v. City of Sioux Center, 967 F.Supp. 1483, 1503-05 (N.D. Iowa 1997). Thus, § 1983 is the procedural mechanism allowing Sequoyah-7 to enforce federally protected rights created under § 1926(b). City of Sioux Center, 967 F.Supp. at 1503-05. Moreover, the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202, provides an alternative enforcement vehicle for rural water districts seeking relief under § 1926(b). Id. at 1506-07; Lexington-South Elkhorn .Water Dist. v. City of Wilmore, 93 F.3d 230, 232 (6th Cir. 1996).

> private franchise for similar service within such area during the term of such loan. . . .

Sequoyah-7 claims to be an association entitled to the protections of § 1926(b) and, further, that Muldrow's actions of annexing certain areas and providing service to consumers within those areas are violations of § 1926(b) entitling it to relief.

Section 1926(b) is understood as "unambiguously prohibit[ing] any curtailment or limitation of a FmHA-indebted water association's services resulting from municipal annexation or inclusion." City of Madison v. Bear Creek Water Assoc., 816 F.2d 1057, 1060 (5th Cir. 1987). Thus, § 1926(b) operates a means to "encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and Farmers Home Administration loans." Lexington South Elkhorn, 93 F.3d at 233. The language of § 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." Bear Creek Water Assoc., Inc., 816 F.2d at 1059.

In order for Sequoyah-7 to establish its entitlement to the protections afforded under § 1926(b), it must prove the following elements: (1) it is an "association" within the meaning of the Act; (2) it has a continuing indebtedness to the FmHA; and (3) Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Lexington-South Elkhorn, 93 F.3d at 234; Bell Arthur Water v. Greenville Utilities Com'n, 972 F.Supp. 951, 959 (E.D.

N.C. 1997). With respect to the first element, Muldrow does not contest Sequoyah-7's status as an "association." As a public nonprofit rural water district created for the purpose of developing and providing an adequate rural water supply, Sequoyah-7 clearly qualifies as an "association" under the Act.

Sequoyah-7 must next establish a continuing indebtedness to the FmHA. In assessing the extent of such indebtedness, Muldrow attempts to restrict Sequoyah-7's attachment to a debt obligation to the September 28, 1994, loan from the FmHA. Muldrow contends Sequoyah-7 cannot avail itself of any loan with the FmHA which predated Sequoyah-7's formation in March 1991. According to Muldrow, the 1969, 1970, and 1981 debt obligations between RWC and the FmHA are not to be considered when determining the extent of the continuing obligation between Sequoyah-7 and the FmHA. The court rejects Muldrow's argument. A review of the materials before the court reveals that Sequoyah-7 is a continuation of Sequoyah-4 and its successor, RWC. All three entities were established for the same purpose - to develop and provide an adequate rural water supply for residents of Sequoyah County, Oklahoma. Upon the formation of Sequoyah-7, all assets and liabilities of RWC became the assets and liabilities of Sequoyah-7. 82 O.S. § 1324.33. The statutes under which Sequoyah-7 was created specifically provide that corporations such as RWC, which were formed prior to December 1, 1988, "may organize and constitute a district subject to the provisions of the Rural Water, Sewer, Gas and Solid Waste Management Districts Act." 82 O.S. § 1324.31. The court concludes Sequoyah-7 is a continuation of the corporate entity RWC; therefore, Sequoyah-7 is entitled, for purposes of § 1926(b)

protection, to avail itself of the loans RWC made with the FmHA beginning in 1969.[4]

It is undisputed, however, that RWC's loans with the FmHA were paid off in 1989. As part of a Congressional effort to reduce the deficit, the Omnibus Budget Reconciliation Act of 1986 required the FmHA to sell some of its bonds and other obligations. Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 40 (6th Cir. 1996), cert. denied, 117 S.Ct. 2497 (1997). Under the Agriculture Credit Act of 1987, the Secretary of Agriculture was required to offer bond issuers such as RWC the option of buying back the debt obligations before the Secretary offered them to third parties. Id. On May 5, 1989, RWC took advantage of this buy out program and extinguished its debt to the FmHA by paying off its obligation at a discounted rate and refinancing through a loan with NBC. With respect to this buy out, Sequoyah-7's financial statements reflect that "[i]n 1989, these loans with outstanding balances of $655,766 were paid off in the discounted amount of $377,931, and were refinanced by a loan in the amount of $320,000 with National Bank for Cooperatives." The promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA" and the debt was no longer carried in the financial records of either RWC or Sequoyah-7.

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[4] Given this finding, the court need not address Muldrow's argument that Sequoyah-7 does not have § 1926(b) protection as a result of its September 28, 1994, loan because that loan was specifically directed to another project and it did not cover the areas in dispute. See Bell Arthur, 972 F.Supp. at 959-61.

Since the federal indebtedness was paid off on May 5, 1989, Muldrow contends the protections afforded under § 1926(b) were extinguished on that date inasmuch as the necessary element of a federal indebtedness is lacking. Sequoyah-7 objects to Muldrow's characterization of the May 5, 1989, buy out program and contends the notes were "sold" as opposed to "discharged" by the discounted pay out and refinancing. Sequoyah-7 contends this distinction is significant because a provision of the Agricultural Credit Act of 1987 (known as "subsection (g)") states that the curtailment prohibition of § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section." By arguing that it "purchased" the notes from the FmHA, Sequoyah-7 seeks to secure the benefit of the coverage provided by subsection (g) and retain its § 1926(b) protections.

The court rejects Sequoyah-7's argument. Subsection (g) has no application to an issuer such as RWC who cancels its debt to the FmHA and refinances the debt through another entity. Subsection (g) is intended for those situations where the FmHA sells a note or debt obligation to a third party. Under this later scenario, the protections of § 1926(b) should "follow the note" as the debt has not been extinguished, but rather, merely transferred to a third party via a sale by the FmHA. When the federal debt is extinguished by the issuer, however, there is no need to extend such protections. The rationale for this distinction has been stated as follows:

> When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to

> one of the main legislative purposes in enacting § 1926(b) - safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid.

Scioto Water, Inc., 103 F.3d at 42. Moreover, the fact that issuers receive a substantial money-saving incentive when paying off their debt to the FmHA supports the existence of a rational basis for extending protection only to obligations sold to third parties, and not to obligations purchased by debtors through the buy out program. Bell Arthur, 972 F.Supp. at 959. Thus, when RWC, Sequoyah-7's predecessor, took advantage of the FmHA buy out program and paid off its debt to the FmHA on May 5, 1989, the protections enjoyed by RWC under § 1926(b) were extinguished and no action taken by Muldrow prior to that time is actionable. See Scioto Water, Inc., 103 F.3d at 40-42; Bell Arthur, 972 F.Supp. at 957-59; City of Sioux Center, 967 F.Supp. at 1523.

The court must next address the protections available to Sequoyah-7 following the May 5, 1989, buy out. It is undisputed that neither RWC nor Sequoyah-7 became indebted to the FmHA between May 5, 1989, and September 28, 1994. Consequently, there is no § 1926(b) protection available to Sequoyah-7 during this time period as no federal indebtedness existed. On September 28, 1994, however, Sequoyah-7 became indebted to the FmHA. Thus, the court must evaluate whether Sequoyah-7's claims arising after

September 28, 1994, including the continuation of service by Muldrow in Sequoyah-7's protected area, are actionable.

In order to evaluate Sequoyah-7's claims in this respect, the court must turn to the third element for a § 1926(b) violation - whether Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Section 1926(b) does not define the term "made service available." One approach to defining this term is to determine whether the "association" has a state law duty to provide service to the area in question. See North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910, 916 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996) (the existence of a state law duty to provide service "is the legal equivalent to"making service available under § 1926(b)); City of Sioux Center, 967 F.Supp. at 1530 (answer to question of whether a rural water district "had a legal right to serve depends entirely upon applicable state law.") Here, Sequoyah-7 cites to the Rural Water, Sewer, Gas and Solid Waste Management District Act, 82 O.S. §§ 1324.1-1324.35, §§ 1324.41-1324.50. The court has reviewed the provisions of this act and finds no duty or obligation on the part of Sequoyah-7 to provide water service. While rural water districts in Oklahoma are certainly formed in order to provide an adequate rural water supply to meet the needs of rural residents within the district's territory, state law does not mandate or require rural water districts to provide water service. Consequently, absent a legal obligation imposed under state law to provide water service to the area in question, the court must determine whether Sequoyah-7 has "made service available" under an alternative approach adopted by the federal courts which have addressed this issue.

An alternative test requires Sequoyah-7 to establish it has "made service available" by demonstrating its legal, authority to serve the disputed territory in combination with a physical ability to do so.[5] The latter part of this inquiry is commonly referred to as the "pipe-in-the-ground test." City of Sioux Center, 967 F.Supp. at 1525; Bell Arthur, 972 F.Supp. at 961; see also Lexington-South Elkhorn, 93 F.3d at 237. The key component of this test is the proximity of the facilities to the area to be served:

> [W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.

Lexington-South Elkhorn, 93 F.3d at 237. In addition to determining whether Sequoyah-7's physical structures - pipes in the ground - are present to serve the disputed territory, the

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[5] Because the court concludes Sequoyah-7 has failed to present sufficient evidence to establish that it has made service available to the disputed territory, the court need not decide whether Muldrow's activities constitute a curtailment of Sequoyah-7's service area. Moreover, the court need not address Muldrow's arguments related to its contention that Sequoyah-7 does not have the legal authority to service the disputed territory.

court also considers whether the structure has the physical ability or capacity to meet the consumers' needs and whether fiscal constraints placed on, or by, Sequoyah-7 impede its ability to service the area. See Bell Arthur, 972 F.Supp. at 962-63 (in determining that rural water district had not made service available, the court considered the capacity of the existing structure and the fact that the rural water district did not have funds available to build the necessary additional lines).

Sequoyah-7 does not contend it has provided water service to the disputed territory in the past. Nor does it contend that it is currently providing such service. Rather, Sequoyah-7's argument is that it "has the ability to provide water service and has made water service available to all of the customers in the dispute." Affidavit of Tommy Click at ¶ 21 (Plaintiff's Exhibit No. 1 to Plaintiff's Motion for Partial Summary Judgment). Sequoyah-7's evidentiary basis for this assertion is found in the affidavit of Tommy Click, Manager of Sequoyah-7. As to the disputed territory and corresponding consumers, Click provides the following details regarding Sequoyah-7's facilities:

> Cherokee Rock Addition - Sequoyah-7 has a 2" water line constructed in 1970 that is approximately 200 feet from the Addition's connection to the Muldrow line. If this line is not sufficient to meet all needs of the Addition, Sequoyah-7 has a 6" line constructed in 1982 approximately 1320 feet from the Addition's connection which is more than sufficient to meet all the water needs of the Addition.

Food Plus/Dollar Store - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the south side of this property to which the customer could connect.

FWCC Trucking Office - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Gunter Ridge Addition - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the east side of the Addition and a 2" line on the west side of the Addition to which the customers could connect.

OK Industries - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

The Gold Crown Motel f/k/a Diana Motel - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

J.D. Hill Truckwash - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the west of the property to which the customer could connect.

J.D. Hill - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

Doug Harvell - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

Laster Realty Co. - Sequoyah-7 has a 2 ½" water line on the west side of the property to which the customer could connect.

Rasamy Mangboupha - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Based on this information, Sequoyah-7 contends it has satisfied the § 1926(b) requirement of having "made service available" to the disputed territory.[6] The court disagrees.

The mere fact that Sequoyah-7 has facilities near or within proximity to the areas and customers in question is insufficient. In Lexington-South Elkhorn, the Sixth Circuit rejected a similar argument. The distribution lines of the rural water district in Lexington-South Elkhorn were located fifty yards from one property and ranging from .1 to .4 miles from other properties. The Sixth Circuit, in affirming the district court's determination that the rural water district, Lexington-South Elkhorn, had not made service available,

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[6] Omitted from this list is any mention of Sequoyah-7's service facilities available with respect to the Bob Prewitt Property (John Bogner) and FWCC Trucking location No. 820138. Consequently, Sequoyah-7's § 1926(b) claim as to these two properties must fail due to the absence any proof that Sequoyah-7 has "made service available."

concluded that "[b]ased on the location of Lexington-South Elkhorn's distribution lines, it had not made service available prior to the time that [the municipality] began providing service to the disputed area." Id. at 237. Similarly, the distances of Sequoyah-7's water lines to the customers in question in this case, ranging from 200 feet to 1 mile, are not within sufficient proximity to establish that Sequoyah-7 has made service available to the disputed territory. Moreover, with respect to the Food Plus/Dollar General and OK Industries facilities, Sequoyah-7's 2 ½ inch water line is insufficient to service those customers' water needs. Without the capacity to deliver water in quantities sufficient, to service these customers, it cannot be said that Sequoyah-7 has made service available. Bell Arthur, 972 F.Supp. at 962-63. Finally, in considering Sequoyah-7's argument for finding that it has made service available based on the proximity of its facilities, the court places great weight on the fact that Sequoyah-7 admittedly would require customers "to pay the cost to connect their facilities to Sequoyah-7's distribution system as provided by state law." The fact that Sequoyah-7 would require consumers, who are already being adequately serviced by Muldrow, to pay for improvements to Sequoyah-7's distribution system militates against a proximity finding in

favor of Sequoyah-7.[7] Id. Consequently, the court finds Sequoyah-7 is not entitled to protection under § 1926(b).

CONCLUSION

The court finds Sequoyah-7 to be ineligible for § 1926(b) protection because it has failed to make service available to the disputed territory and customers. Thus, Sequoyah-7's motion for partial summary judgment is denied and Muldrow's motion for partial summary judgment is granted. Sequoyah-7's claims for § 1926 (b) protection brought pursuant to 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202, and a constructive trust theory, are hereby dismissed. This action is therefore dismissed in its entirety.

IT IS SO ORDERED this 12th day of June, 1998.

/s/_____
Frank H. Seay
United States District Judge

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[7] The court likewise rejects Sequoyah-7's alternate solution to the proximity issue - supply proximity by converting Muldrow's water lines to Sequoyah-7's. Sequoyah-7 relies on North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996), for this proposition. The court rejects this draconian remedy and finds it is not authorized by any legal authority. Sequoyah-7 has the affirmative obligation under section 1926(b) to make service available - it may not satisfy this obligation by riding the coattails of a municipality's constructive efforts to provide water service to consumers who would otherwise be without service.

APPENDIX 2

Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property.

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX 3

Powers Reserved to States or People.

The powers not delegated to the United States by Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

MOTION FILED

JAN 2 8 2000

No. 99-1081

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

TOWN OF MULDROW, ET AL.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

and

BRIEF OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS TOWN OF MULDROW, ET AL.

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MOTION OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTORARI

The Texas Municipal League (TML) and the Texas City Attorneys Association (TCAA) respectfully move this Court for leave to file the accompanying *Amici Curiae* Brief in the case styled *Town of Muldrow, et al. v. Sequoyah County Rural Water District No. 7;* No. 99-1081. The consent of counsel for the Petitioners herein has been obtained and has been filed with this Court on even date herewith. However,

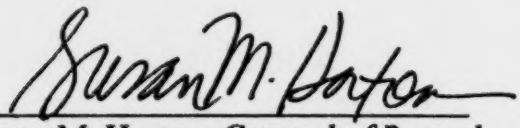
counsel for the respondents herein having heretofore refused to consent to the filing of amicus curiae briefs in this matter, TML and TCAA now file this motion and would respectfully show the Court as follows:

The Texas Municipal League (TML) is a non-profit association of approximately 1,045 Texas cities. Over 13,000 mayors, councilmembers, city managers, city attorneys, and department heads are member officials of the League by virtue of their cities' participation. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of 434 attorneys who represent Texas cities. TML's Legal Defense Program was established to monitor major litigation that affects cities and to file briefs on behalf of cities in cases of special significance to cities.

Amici Curiae urge the Court to grant certiorari in this case to address a federal question of vital importance to cities and towns throughout this country. Since enactment of 7 U.S.C. § 1926(b) in 1961, the provisions therein prohibiting a municipality from encroaching upon the service area of a federally-indebted rural water supply association have been construed by federal courts in manners that have become increasingly threatening to the ability of cities to grow and maintain their financial viability. The ruling of the Tenth Circuit in the instant case extends that construction further than it has heretofore been extended, at a time when cities are experiencing substantial growth and unprecedented demands for city services. *Amici Curiae* believe that the Tenth Circuit's decision in this case is violative of the Tenth Amendment of the United States Constitution and that its application is contrary to the exercise of other laws having the same original purpose as § 1926(b), and respectfully urges the Court to grant Petitioner's application for writ of certiorari.

WHEREFORE, TML respectfully requests that this Court grant this Motion for Leave to File the following *Amici Curiae* Brief.

Respectfully submitted,



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BRIEF OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS TOWN OF MULDROW, ET AL.

INTEREST OF AMICI CURIAE

The Texas Municipal League (TML) is a nonprofit association of 1045 Texas municipalities. Over 13,000 mayors, councilmembers, city managers, city attorneys, and department heads are member officials of TML by virtue of their cities' participation. These officials are responsible for the management and governance of cities in which approximately 79 percent of the population of Texas,

currently estimated to be nearly 20 million people, reside.[1] The TML Legal Defense Program was established to monitor major litigation that affects municipalities and to file briefs on behalf of cities in cases of special interest to municipalities. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of 434 attorneys who represent Texas municipalities.

Pursuant to the Rules of this Court, the consent of counsel for the Petitioners herein has been obtained and has been filed with this Court on even date herewith. However, counsel for the respondents herein having heretofore refused to consent to the filing of amicus curiae briefs in this matter, TML and TCAA file the accompanying motion for leave to file this Amici Curiae Brief.

Amici Curiae urge the Court to grant certiorari in this case to address a federal question of vital importance to cities and towns throughout at least fifteen states in the United States. At issue is expansion of the judicial interpretation of a narrow federal law--7 U.S.C. § 1926(b)--that has become increasingly threatening to the well-being of the cities and citizens in Texas and other states in which numerous rural water supply associations are located. Those states are predominantly the nation's southern and southwestern states.[2]

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[1] "1998 Total Population Estimates for Texas Metropolitan Statistical Areas," http://www.cpa.state.tx.us/ecodata/popdata/popfiles.html; "Texas State Data Center population estimates, 1990 to 1998," http://www.txsdc.tamu.edu/tpepp/1998_txpopest_msa.html. The 1998 population of Texas was estimated to be 19,925,577 persons.

[2] The Southern Municipal Conference, comprised of the municipal leagues of the fourteen southern and southwestern states has identified § 1926(b) as a significant problem in every member state. In response to a survey by the National League of Cities, § 61926(b) was identified as a problem in Indiana as well as the fourteen southern and southwestern states. The states in the Southern Municipal Conference are Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New

Amici Curiae believe this is an issue of great significance to cities throughout the southern and southwestern United States, and certainly in Texas because of the frequency with which cities encounter rural water supply corporations during the natural process of city growth and expansion, and the extent to which 7 U.S.C. § 1926(b) has been employed to either curtail that growth or to compel affected cities to pay large sums of money in order to grow and provide the services their citizens expect and require.

REASONS FOR GRANTING THE WRIT

A. Section 1926(b), as Interpreted by the Tenth Circuit, is Violative of the Tenth Amendment

Recent decisions of the United States Supreme Court clearly establish that the Tenth Amendment prohibits the federal government from imposing responsibilities upon state officers without the State's consent, from compelling a State to administer a federal regulatory program, and that Congress has other methods besides outright coercion by which it may urge a State to adopt a legislative program consistent with federal interests. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

In the pending case, the Tenth Circuit has elevated the interest of the Federal Government in protecting its investment in rural water associations to a level that utterly eclipses a State's interest in providing adequate services to its urban citizens, protecting the viability of its cities, and in ensuring adequate protection of the health, safety, and

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Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.

welfare of its citizens. The City of Muldrow, Oklahoma, according to the Tenth Circuit's decision, is prohibited under § 1926(b) by the federal debt of Sequoyah County Rural Water District No. 7, not only from providing water service in areas outside the city, but to areas inside the city. This is so despite the fact that the city provided water service to some of the disputed areas prior to Sequoyah's federal indebtedness. Furthermore, the Tenth Circuit decision extends the § 1926(b) doctrine further than it has ever been applied by announcing that "[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." *Sequoyah Co. Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1197 (10th Cir. 1999).

The history of judicial interpretation of § 1926(b) has been one of conflict between rural and urban interests. From a city perspective, the original intent of the law has been turned on its head. Instead of being utilized to promote the provision of water service to rural areas, it has become a major tool to contain the growth of cities. Cities are unable to expand into adjacent areas, even when the citizens therein request the expansion, when those areas are served by a rural water association that owes money to the federal government. Cities do not even have the option of paying off the debt of the association in order to grow. Instead, the city either loses new development or is required to raise taxes in order to serve its growing population. In essence, judicial interpretation of § 1926(b) is creating greater financial instability within cities than it is relieving within rural areas.

The State of Texas, like other states, has enacted laws authorizing incorporated cities to annex property in order to grow and meet the demands for services that the influx of new population and businesses brings. *See,* TEX. LOCAL

GOV'T CODE ANN. Ch. 43 (Vernon Supp. 2000). Those laws were revised significantly during the 1999 session of the Texas Legislature in order to ensure that cities would supply the levels of city services that their citizens expect and require. The State of Texas has also enacted legislation detailing the procedure that an incorporated city must pursue in order to take over the provision of water and sewer service in a newly annexed area that is currently being served by another utility, such as a rural water association. TEX. WATER CODE ANN. § 13.255 (Vernon Supp. 2000).

The State of Texas has never, however, enacted a law giving its consent to the Federal Government to preempt and eclipse these state laws through the exercise of the § 1926(b) program. That is the effect that § 1926(b) is now having in Texas, however. Populations are swelling and citizens are moving into cities expecting and demanding services. Yet, so long as a rural water association adjacent to a city maintains even a modicum of § 1926(b) debt, the city's only options are either to (1) cease expansion of its tax base, raise taxes within its existing corporate limits in order to provide the necessary new services (thereby driving citizens out of the city and promoting inner-city decay), or (2) pay the water association whatever price the association demands in order to surrender its § 1926(b) claim. Amici Curiae believes the same situation exists in Oklahoma and the other states in which city interests have been rendered submissive to § 1926(b).

Thus, if the Tenth Circuit's decision is allowed to stand, its effect will be the same as that which was found to violate the Tenth Amendment in *Printz* and *New York*. Local and state officers, as well as the state itself, become responsible for protecting the federal government's investment while local and state needs and laws become subservient to the federal government's program, despite the fact that there is

neither a state or local incentive to comply nor state consent for implementation of the federal program.

The citizens who receive water service from the federally-indebted water association are also placed at risk. In most cases, rural water associations own distribution facilities capable of delivering potable drinking water, but lack facilities capable of providing fire protection. *See, e.g., Rural Water System No. 1 v. City of Sioux Center, Iowa,* 29 F. Supp. 2d 975 (N.D. Iowa, 1998, affm'd in part; rev'd in part, ___ F. 3d ___, 8th Cir., No. 98-4160, 99-2005, Jan. 26, 2000). Accordingly, a citizen who desires better fire protection services, or any of the myriad of services cities supply for the protection of the health, safety, and welfare of citizens, and which are not or cannot be supplied by a rural water association, must wish in vain to be annexed, or to otherwise be served by the city, so long as the water association may rely on § 1926(b).

As this Honorable Court is well aware, there was an absence of federal commandeering statutes "until very recent years." *Printz, supra* at 914. Furthermore, this Court's Tenth Amendment analysis of this type of situation was infrequent during the years that the federal government used financial assistance, rather than mandate, to promote states' environmental and utility service programs.

Near the end of those years, a Tenth Amendment argument against the application of § 1926(b) was raised in *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.,* 816 F.2d 1057, 1060-61 (5th Cir. 1987). Therein, the City's Tenth Amendment argument was rejected and the Fifth Circuit observed that the "characterization of § 1926(b) as resting on Congress's undoubtedly broad powers under the spending clause seems more appropriate to this case than any commerce clause-based argument." (*Garcia* being a Commerce Clause case) *Id.* at 1061.

Since 1987, this Court has provided guidance that was not available to the Fifth Circuit in *Madison,* which relied on *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The power of Congress pursuant to the spending clause, we now know, is applicable to Tenth Amendment analysis in the sense that Congress may, under its spending power, attach conditions on the receipt of federal funds, thus providing incentive for the state to adopt a legislative program that is consistent with federal interests. *New York, supra* at 168. Under § 1926(b), federal funds are offered not to the state, but to water associations that usually operate as a non-profit or statutorily created corporation.

The *Madison* court was accurate however, in characterizing the relationship of § 1926(b) and the commerce clause as inappropriate for purposes of a Tenth Amendment analysis. *See, Reno, Attorney General, et al v. Condon, Attorney General of South Carolina, et al,* No. 98-1464 (U.S. Jan. 12, 2000), http://caselaw.findlaw.co/US /000/98-1464.html.

Furthermore, the *Madison* court rejected the City's Tenth Amendment argument by reasoning the § 1926(b) does not "permanently curtail the city's authority, because it applies only while the federal debt is outstanding." *Madison* at 1061. The case for which application is now pending, however, clearly demonstrates the fallibility of this reasoning. The Sequoyah Water District received four separate federal loans, three of which originated and were paid off before the controversy between the district and the city arose. Nevertheless, the Tenth Circuit held that the district was entitled to § 1926(b) protection during the pendency of all the loans, so that city encroachment that occurred under a loan that has since been satisfied, as well as city water service initiated before the district's funding under a current loan, is protected. *Sequoyah Co. Rural Water Dist.*

No. 7, supra at 1199, 1200. In other words, the Tenth Circuit's ruling makes clear that a rural water association need only keep a loan alive permanently--whether by extension or a new loan, regardless of the amount of the loan, in order to have permanent protection under § 1926(b).

Amici Curiae urge that the reasons for the *Madison* Court's rejection of a Tenth Amendment argument are no longer viable, and that certiorari should be granted in order that the court may examine § 1926(b) in light of more recent rulings and the constitutional obligation of the Federal Government to leave "to the several States a residuary and inviolable sovereignty." *New York, supra* at 189, citing THE FEDERALIST No. 39, p. 245 (C. Rossiter ed. 1961).

B. The Tenth Circuit's Decision Conflicts With and Will Disrupt Existing and Developing State and Federal Drinking Water Programs, the Goals of Which are Consistent with § 1926(b)

Section 1926(b), enacted in 1961, was an early attempt to promote the supply of drinking water to rural areas and protect the viability of rural water systems. In addition to protecting the federal investment in such systems, Congress's purposes in enacting § 1926(b) has been described as

> 1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and
> 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns. *Madison, supra* at 1060.

In 1974, Congress enacted the Safe Drinking Water Act (SDWA), and has subsequently amended and reauthorized

the SDWA in order to ensure the safety and adequacy of drinking water supplies in all systems having at least fifteen service connections or serving at least twenty-five individuals. 42 U.S.C. §§ 300f(4)(A); 300g. There are currently about 192,000 water systems in the United States subject to SDWA. J. Bryck, "AWWA White Paper on Viability" p. 1 (American Water Works Association, 1994). Eighty-seven percent of community water systems in the nation serve less than 3300 persons. USEPA, "Safe Drinking Water Act Reauthorization Overview" p. 8 (EPA Publication No. 810/S-94-001, February 1994). In Texas, ninety-four percent of all water systems serve less than 2500 customers. R. Jenson, "The High Cost of Drinking Water" 16 TEXAS WATER RESOURCES INSTITUTE No. 2, (College Station, TX, Summer 1990).

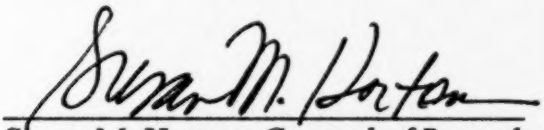
While many small systems are meeting the financial, managerial and technical requirements of the SDWA, others are not. Congress, EPA, states, and water associations are addressing this problem through programs designed to prevent formation of non-viable systems and the elimination of existing non-viable systems. A significant aspect of the viability programs is the ability and authority of a viable system to extend its services into, and to be authorized to provide service to the customers of a non-viable utility.

The goals of the viability programs are consistent with the original intent of § 1926(b), but as interpreted by the Tenth Circuit and other courts, § 1926(b) may now be used to sustain and extend the existence of a non-viable system, while preventing a viable city-operated system from providing service. To foster such inconsistent application of important federal laws through narrow interpretation of a law created for the same purposes as the laws being impinged upon is not sound policy, and should not be further promoted.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request the Court to grant the petition for certiorari.

Respectfully submitted,



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MOTION FILED

JAN 28 2000

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v.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF *AMICUS CURIAE* THE WATER WORKS AND SEWER BOARD OF THE CITY OF BIRMINGHAM FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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The Water Works and Sewer Board of the City of Birmingham (herein referred to as the "Board"), hereby moves, pursuant to Rule 37.2(b) for leave to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. The Petitioners, Town of Muldrow and the Muldrow Public Works Authority, have consented to the filing of this brief, but the Respondent, Sequoyah County Rural Water District No. 7, has withheld its consent for filing of *amicus curiae* briefs. A copy of the proposed *amicus* brief is attached.

The Board is an Alabama public corporation organized under Alabama law for the purpose of supplying water and sewer services to the Birmingham metropolitan area. As such, the Board operates, on behalf of the City of Birmingham (herein referred to as the "City"), a water system which service area includes not only areas within the City limits, but also has expanded over the years to serve outlying rural areas. The Board, on behalf of the City, has invested substantial amounts in its infrastructure to supply water to its customers in these outlying areas, and holds property interests in easements, pipelines, and pump stations, which have been acquired or constructed to provide such service. The revenues generated from supplying such areas comprise an important part of the revenues necessary to finance the continued operation and improvements to the Board's system.

The Tenth Circuit's holding in *Sequoyah County Rural Water District v. Muldrow*, 191 F.3d 1192 (10th Cir. 1999), represents a threat to the Board and other municipal water systems throughout the nation because that court construed 7 U.S.C. § 1926(b) to authorize a taking of vested property rights without just compensation, in violation of the Fifth

Amendment. These property rights include investments in infrastructure and capital improvements, and the right to serve customers in areas where water service has been extended.

The Board believes its brief can assist the Court because it raises a relevant issue not previously raised by the parties. As more fully explained in the proposed brief, a "cardinal" principle of statutory construction adopted by this Court provides that courts should construe statutes so as to avoid constitutional problems, unless such construction is contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bld. & Constr. Trades Council,* 485 U.S. 568, 574 (1988). The Tenth Circuit's holding completely disregards this long-standing principle, resulting in an unconstitutional construction of § 1926(b).

Thus, for the preceding reasons, the Board has an interest in this action, and requests the Court to grant it leave to file its *amicus curiae* brief, attached hereto.

Respectfully submitted,

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STATEMENT OF INTEREST

Amicus curiae, The Water Works and Sewer Board of the City of Birmingham (herein referred to as the "Board"), originally chartered as the Birmingham Water Company in 1885, is an Alabama public corporation which provides water to the Birmingham metropolitan area and many outlying areas.[1] The Board also operates, on behalf of the City, a water distribution system consisting of pipelines, pump stations, water tanks and other facilities. Over its years of operation, as the Board has extended its service area to outlying rural areas, it has made capital improvements to its water distribution system in order to supply customers in such areas. The Board has also acquired real property interests in the nature of easements and right-of-ways to supply such areas. The revenues generated from supplying customers in these rural areas comprise an important part of the revenues needed to finance the continued operation and improvements to the Board's water system. The Tenth Circuit's holding in this matter extends the protection from competition for rural water associations receiving federal loans under 7 U.S.C. § 1926(b). According to the Tenth Circuit, once a rural water association obtains a federal loan under this Section, the protection under § 1926(b) attaches to prohibit a municipal supplier from continuing to serve its own customers within the rural water association's service area, regardless of the fact that the municipality began service prior to the extension of the loan. Such an interpretation of § 1926(b) effects a "taking" and represents a threat to the Board's property rights

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1. Counsel for a party in this case has not authored any part of this brief, and other than *amicus curiae*, its members and its counsel, no other person or entity has made a monetary contribution to the preparation or submission of this brief.

and interests in rural areas, along with its ability to continue its operation and improvements to its water system. Thus, the Board has an interest in this matter.

SUMMARY OF THE ARGUMENT

The Tenth Circuit failed to apply a "cardinal" principle of statutory construction adopted by this Court which provides where the construction of a statute raises "serious constitutional problems," courts must inquire whether there is another interpretation which will not raise such problems. *National Labor Relations Bd. v. Catholic Bishop,* 440 U.S. 490 (1979). The Tenth Circuit's construction of 7 U.S.C. § 1926(b) allows a rural water association, which receives a federal loan pursuant to the statute, to prevent a municipal water supplier from continuing to serve pre-existing customers within the rural water authority's service area, even though such customers were connected to the municipality's system *prior* to the date of the loan. Not only is this holding clearly contrary to the holdings of the majority of Circuits that have construed § 1926(b), but it also conflicts with the Fifth Amendment's prohibition on the taking of property without payment of just compensation.

The Tenth Circuit's construction of § 1926(b) would authorize a "taking" either through a municipality's loss of use of its infrastructure within the affected area, including water lines and other facilities, or through the imposition of a "constructive trust" over such pipelines and facilities for the benefit of the rural water authority's customers. *Sequoyah,* 191 F.3d at 1194, 1206. It is clear that Congress only intended for the protection from competition under § 1926(b) to apply to the substitution of water suppliers

during the term of the loan, not the initiation of water services prior to such loan nor the continuation of services after the loan is extended. Because there is no indication of legislative intent for § 1926(b) to authorize a taking, this Court should grant the Petition to construe § 1926(b) to avoid any Fifth Amendment problems.

ARGUMENT

The Tenth Circuit held that the Respondent, Sequoyah County Rural Water District No. 7 (herein referred to as "Sequoyah"), was entitled to seek relief pursuant to 7 U.S.C. § 1926(b) for the Petitioners', Town of Muldrow and Muldrow Public Works Authority (herein collectively referred to as "Muldrow") initiation of water service to customers in rural areas within Sequoyah's service area, which service continued beyond the date that Sequoyah received a federal loan under 7 U.S.C. § 1926(b), despite the fact that Sequoyah did not have such loan at the time Muldrow began servicing these areas. *Sequoyah,* 191 F.3d at 1206. This holding is contrary to this Court's long established principle that where the construction of a statute would raise serious constitutional problems, the court should construe the statute to avoid such problems unless such construction is clearly contrary to the intent of Congress. The Tenth Circuit's construction of § 1926(b) would allow a taking of Muldrow's property without payment of just compensation in violation of the Fifth Amendment of the Constitution of the United States.

In *Richmond Screws Anchor Company v. United States,* 275 U.S. 331, 346 (1928), this Court held that "[i]t is our duty in the interpretation of federal statutes to reach a

conclusion which will avoid serious doubt of their constitutionality." Similarly, in *United States v. Security Industrial Bank,* 459 U.S. 70, 82 (1982), this Court declined to construe section 522(f)(2) of the Bankruptcy Reform Act of 1978 so as to "call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the 'takings clause.'" In *Edward J. DeBartolo Corporation v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, (1988), the National Labor Relations Board interpreted section 8(b)(4) of the National Labor Relations Act in a manner which violated the First Amendment. This Court noted that the above rule of statutory construction "has for so long been applied by this Court that it is beyond debate" and held that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.,* 485 U.S. at 574 (citing *National Labor Relations Bd. v. Catholic Bishop,* 440 U.S. 490, 500 (1979); *Crowell v. Benson,* 285 U.S. 22, 62 (1932); *Murray v. The Charming Betsy,* 2 L. Ed. 208 (1804)). This Court further stated,

> [t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

DeBartolo Corp., 485 U.S. 568 (citing *Hooper v. California*, 155 U.S. 648, 657 (1895); *Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269 (1884)).

The Fifth Amendment provides in part "[n]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. This Court has held that the Fifth Amendment protects the property of states from appropriation by the federal government. *United States v. Carmack*, 329 U.S. 230, 242 (1946), *reh'g denied*, 329 U.S. 834 (1947). A statute regulating property uses effects a taking if it causes the owner to incur a "physical invasion of his property" or if it causes the owner to lose all "economically viable" uses of his property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

In this action, Sequoyah sought declaratory and injunctive relief, as well as damages for Muldrow's water sales, which it alleged, violated § 1926(b). *Sequoyah*, 191 F.3d at 1194. Sequoyah also requested a constructive trust for its use and benefit, over all of Muldrow's water lines and facilities used to serve residents within Sequoyah's service area. *Id. See Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, Petitioner App. B, p. 34a, n.2. The Tenth Circuit declined to address the constructive trust issue but instructed the District Court on remand to determine the appropriate remedy. *Sequoyah*, 191 F.3d at 1194, n.3. In holding that Sequoyah may seek recovery for water services initiated by Muldrow during a time period when Sequoyah did not have a federal loan, but which continued after Sequoyah received a federal loan, the Tenth Circuit has construed § 1926(b) to allow an unconstitutional taking of

Muldrow's property, either by the "physical invasion" of imposition of a constructive trust over its pipes and other facilities or by prohibiting the continued sale of water to Muldrow's customers, thereby causing Muldrow to lose the "economically viable" use of its pipes and facilities.

The Consolidated Farm and Rural Development Act authorizes the Secretary of Agriculture to make loans to nonprofit water service associations to promote water use and development to assist farmers and other rural residents. 7 U.S.C. § 1926(a). Section 1926(b) provides,

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b). The Fourth Circuit has held that the purpose of § 1926(b) is to protect federal loans under the Rural Development Insurance Fund. *Bell Arthur Water Corp. v. Greenville Utilities Comm'n,* 173 F.3d 517, 523 (4th Cir. 1999). The court explained that such purpose is obvious based upon the language of the statute, which only provides protection from competition "during the term of such loan."

Bell Arthur, 173 F.3d at 523. Similarly, the Sixth Circuit has also held that the intent of this Section is to protect the federal lender's interest during the term of the loan. *Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 42 (6th Cir. 1996). The Seventh Circuit has interpreted § 1926(b) to prohibit another water supplier "from being substituted for, and from displacing, the service of the rural water association." *CSL Utilities, Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 135-36 (7th Cir. 1993) (citing S. Rep. No. 566 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309).

Because Congress intended § 1926(b) to provide protection from competition only during the term of the federal loan, it is clear that where no such loan exists, municipal or private water services may begin servicing customers in rural areas. Likewise, because the statutory protection only applies where a municipal water supplier displaces a rural water association from serving an area, Congress clearly did not intend for § 1926(b) to divest a prior water supplier of vested property rights merely by the subsequent funding of a federal loan. Thus, there is not a clear indication that Congress intended for § 1926(b) to authorize a taking of property rights. Since § 1926(b) can be reasonably construed to avoid constitutional questions of its validity under the Fifth Amendment, such construction should be ascribed to this Section.

CONCLUSION

For the foregoing reasons, this *Amicus* urges the Court to grant Muldrow's Petition for Writ of Certiorari. In so doing, the Court can determine whether there is another reasonable interpretation of 7 U.S.C. § 1926(b), which does not raise serious Fifth Amendment concerns, that can be resorted to in order to save such Section from unconstitutionality.

Respectfully submitted,

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No. 99-1081

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER - TOWN OF MULDROW

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PARTIES TO THE PROCEEDINGS

PETITIONERS

Town of Muldrow and the Muldrow Public Works Authority. The Muldrow Public Works Authority is a public trust, of which the Town of Muldrow is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "Town of Muldrow", and "Muldrow" are intended to encompass both Petitioners.

RESPONDENT

Sequoyah County Rural Water District No. 7. Referred to herein as "Sequoyah."

QUESTION PRESENTED

Whether the interpretation of 7 U.S.C. § 1926(b) by the Tenth Circuit Court of Appeals violates the rules of statutory interpretation.

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986). 5

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the signatory respectfully makes this motion for leave to file an *amicus curiae* brief in support of Petitioner.

The movant and as *amicus curiae* for Petitioner, is a governmental agency chartered by the General Assembly of the State of North Carolina to provide utility services within and outside of the corporate limits of the City of Greenville, North Carolina.

States, like North Carolina, do not require or exempt rural water associations from regulation by the State Public Service Commission. N.C.G.S. §62-3(23)(d). As part of this exemption or exclusion, rural water associations may but are not required to obtain Certificates of Public Convenience and Necessity or to establish themselves as a water district. See N.C.G.S. §62-110.5.

Where rural water associations are not regulated, either by choice or statutory exception, the use of the federal loan program for construction of water facilities to provide potable water to rural customers has been used not as a shield against expansion by municipalities but as a sword to promote expansion without a corresponding demonstration of ability to serve.

The decision in the court below squarely holds statutory interpretation, which is not in conflict with the plain meaning of the statute and the legislative intent, can be ignored to the detriment of municipalities or other governmental agencies. This Court's decision will potentially affect all similar statutes and municipalities. The amicus thus has a strong interest in the outcome of the case.

OBJECTIONS AND CONSENT

The Petitioner, Town of Muldrow, does not object and gives its consent to the filing of this motion and the brief of *amicus curiae*. (Appendix I). The Respondent, Sequoyah, does not consent and objects to this motion.

SUMMARY OF ARGUMENT

This Court and the federal circuits, when called upon to address an issue of statutory interpretation, have declared the plain meaning of the statute governs where the language is unambiguous.

With the exception of the Tenth Circuit Court of Appeals in the present case, the federal courts that have been called upon to provide an interpretation of 7 U.S.C. § 1926(b) concerning federal loans to rural water associations and the buy out provisions authorized by Congress in 1986 and 1987, have declared these statutes to be unambiguous and the intent of the legislators clear from the plain meaning of these statutes.

The court below acknowledged and agreed with the basic rules of statutory interpretation, but went further than the intent of the legislators in applying the word "curtailment" to the phrase "during the terms of the loan." The court erred in its interpretation by concluding a water association could seek damages or other relief by an alleged encroaching utility after the loan had been paid and satisfied and the debt discharged. Such an interpretation affords greater protection than is declared as the purpose of the statute and is an improper taking of affected the governmental agency's property.

For these reasons, the signatory prays this Court to grant this motion for leave to file an *amicus curiae* brief in support of Petitioner's request to reverse the decision of the court below.

ARGUMENT
POINT I

THE FEDERAL STATUTES - 7 U.S.C. § 1926(B), OMNIBUS RECONCILIATION ACT OF 1986 (PUB.L. NO. 99-509) AND AGRICULTURAL CREDIT ACT OF 1987 (PUB. L. NO. 100-233) - ARE UNAMBIGUOUS ON THEIR FACE.

The court erred in its interpretation of the protections afforded under 7 U.S.C. § 1926(b) as to the continuing indebtedness prong of the test. The two prongs of the test, as set forth in Glenpool Utility Services Authority v. Greek County Rural Water District No. 2, 861 F.2d 1211, 1214 (10th Cir., 1988), are (1) have a continuing FmHA indebtedness and (2) have provided or made service available to the disputed area; Accord Bell Arthur Water Corporation v. Greenville Utilities Commission, 972 F.Supp. 951, 959, aff'd. 173 F3d 517 (4th Cir., 1999). As was noted by the court, § 1926(b) must be given a broad or liberal interpretation. Bell Arthur Water Corporation v. Greenville Utilities Commission, Id. citing. Jennings Water, Inc. v. City of North Vernon, Indiana, 895 F.2d 311, 315 (10th Cir., 1998).

In interpreting or construing a statute, the first task for any court is the language of the statute itself. Rural Water System #1 v. City of Sioux Center, Iowa, 967 F. Supp. 1483,1516 (N.D. Iowa, 1997) citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed. 2d 290 (1989). When the language of the statute is plain and unambiguous, no further inquiry is necessary and the court's duty is to enforce the statute according to its terms, except when a literal reading of the statute creates a result contrary to the legislator's intent. Rural Water System #1, 967 F. Supp. at 1517. However the meaning of the statute whether plain or not is dependant upon context. Rural Water System #1, 967 F. Supp. at 1518-1519.

The focus of the liberal interpretation of § 1926(b) by the 10th Circuit involved the interpretation of continued protection as a result of the rural water association's participation in Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, and the Agricultural Credit Act of 1987, Pub. L. 100-233, particularly subsections (f) and (g).

The court improperly dismissed the interpretation of these subsections of the buy out programs as set forth in Scioto County Regional Water District No. 1 v. Scioto Water, Inc., 103 F.3d 38 (6th Cir., 1996) but also the extensive analysis of these two statutes by the district court in Rural Water System No. 1 v. Sioux Center, Iowa, 916 F. Supp. at 1516-1523. Since CSL Utilities, Inc. v. Jennings Water, Inc., 16 F.3d 130 (7th Cir., 1994), the courts have consistently held § 1926(b) protection is available only for the life or time of the loan.

In the present case, Sequoyah County Rural Water District No. 7, participated in the statutory buy out provisions and its debt to the United States was extinguished. Sequoyah County Rural Water District No. 7 v. Town of Muldrow, 191 F.3d 1192, 1200 (10th Cir., 1999). However, the court concluded "even if a water association has repurchased its loan and discharged its debt to the government, encroachments which occurred during the terms of the loan are protected." *Id.* at 1200. In making this determination, the court took the phrase "during the term of such loan" out of context and used it to apply its own interpretation to the word "curtailment." By doing so, not only did the court ignore the rules concerning statutory construction, but ignored one of the most purposes of § 1926(b). "The primary beneficiaries of § 1926(b)'s ban on association service curtailment are not the associations themselves, but rather the FmHA and the individual rural consumers who would not have inexpensive and reliable water service without FmHA supported rural water associations." (emphasis added) Jennings Water, Inc. v. City of North Vernon, Indiana, 895 F2d 311, 317 (7th Cir., 1989).

The interpretation of the Tenth Circuit is without foundation or support. As noted in North Shelby Water Company v. Shelbyville Municipal Water and Sewer Commission, 803 F. Supp. 15, 22 (E.D.Ky., 1992), curtailment is that which would reduce its per unit costs and make the loan more secure. There was no evidence presented nor addressed by the court to demonstrate such curtailment. The court simply concluded such would "create a disincentive" for the rural water association to repay its loan. It is apparent from the undisputed facts there was no such disincentive or curtailment.

POINT II

THE STATUTES DO NOT PERMIT THE TAKING OF PROPERTY BY THE WATER ASSOCIATION.

In one of the first cases to decide 7 U.S.C. § 1926 - City of Madison, Mississippi v. Bear Creek Water Association, 816 F.2d 1057 (5th Cir., 1987), the court held a municipality could not curtail a water association's service area by exercising its right of condemnation through eminent domain proceedings.

The interpretation by the court below of this statute creates the reverse situation. As noted by the Fourth Circuit in Bell Arthur Water Corporation v. Greenville Utilities Commission, 173 F.3d 517, 524-526 (4th Cir., 1999), the area served is defined by where service has been made or made available and the capacity or ability to make such service available in order to repay its federal loan.

Nowhere in the decision of the court below, did it find as a material fact in dispute, even affording the reasonable inferences to the nonmoving party Sequoyah, that the water association's ability to repay its federal loan or provide low per user cost was curtailed. The court below, contrary to the standards set forth in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986), sought to establish materiality

not as a criteria for categorizing factual disputes, but as a means of evaluating the evidentiary foundations of the disputes.

As a result of its interpretation, the Tenth Circuit asserts water associations, whose debts have been discharged, may take the property of a municipality where there are no "rights" capable of protection. Sequoyah no longer had a right to assert the "shield of protection" under 7 U.S.C. § 1926(b) because its debt was discharged; however, the decision below gives it a "sword" to take from a municipality.

CONCLUSION

The Tenth Circuit's decision was not supported by the law governing statutory interpretation. On the contrary, it took unambiguous statutory language out of context, and created an exception or interpretation to the plain meaning of the statute that failed to consider the whole law and its objections and policy. Hennepin County Medical Center v. Shalala, 81 F.3d 743, 748 (8th Cir., 1996). For this reason, the Court should grant certiorari to prevent such abuse of interpretation and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that pursuant to Sup. Ct. R. 29, three copies of the foregoing Motion for Leave to File Amicus Curiae Brief was served on the parties in the case before this Court by depositing the same by First Class Mail, postage prepaid with the United States Postal Service and mailed to the counsel for the parties at the following addresses:

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No. 99-1081
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TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CONSENT TO FILING OF BRIEF BY AMICUS CURIAE

Pursuant to Rule 37, Rules of the Supreme Court of the United States, the Petitioners hereby consent to the filing by the Greenville Utilities Commission of a brief as *amicus curiae*.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE ALABAMA WATER AND WASTEWATER INSTITUTE AND THE ALABAMA LEAGUE OF MUNICIPALITIES AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Alabama Water and Wastewater Institute (hereinafter "AWWI") and the Alabama League of Municipalities (hereinafter the "League") respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae*. The consent of counsel for the petitioners herein has been obtained and filed with the clerk of this Court, but counsel for the respondent herein has refused to consent to the filing of a brief by AWWI and the League as *amici curiae*.

AWWI is a non-profit organization representing fourteen of the largest water producers in the State of Alabama. Its members are public corporations and municipal boards organized and existing pursuant to Acts of the Legislature of Alabama for the purpose of operating water

and/or sanitary sewer facilities within the State of Alabama. The applicant, AWWI, has an interest in this case in that there are over 700 rural water systems (hereinafter "rural water authorities") eligible for federal rural development loans in the State of Alabama. Of these, a substantial number have received loans from the Farmers Home Administration ("FmHA") and its successor agency (the USDA Rural Utilities Service, PL 103-354), and consequently enjoy the protection provided by 7 U.S.C. § 1926(b). Members of AWWI routinely provide service to rural water customers to whom service would otherwise be unavailable and have a decided interest in protecting their investments in rural water development. If adopted by the United States Court of Appeals for the Eleventh Circuit, the decision in this case could cause members of AWWI to forfeit substantial amounts of infrastructure and other capital investments and would deter future rural water development by municipalities and other public bodies.

The League is a voluntary association representing approximately 435 cities and towns in the State of Alabama. Members of the League represent roughly 99 percent of the urban population of the State of Alabama. The applicant, the League, has an interest in this case in that many of its members operate water systems, either through the municipal council or through boards appointed by the council. These systems also frequently provide water service to customers in rural areas. The decision in this case directly impacts the ability of municipal systems to develop water service in these areas by deterring municipal expansion for fear of retroactively losing their investment.

The brief of the petitioners herein argues that the United States Court of Appeals for the Tenth Circuit erroneously held that 7 U.S.C. § 1926(b) prohibited the

Town of Muldrow from continuing service to water customers in the respondent's service area after the respondent obtained a loan from the FmHA, even though the municipality began serving those customers prior to the date of the loan. However, the discussion therein does not fully address the constitutional implications created by the holding of the Tenth Circuit. In support of the petitioners herein, AWWI and the League propose that the Tenth Circuit's broad interpretation of § 1926(b) protection raises legitimate constitutional concerns. Under the Tenth Circuit's construction, a municipality or other public body lawfully supplying water to rural customers could be forced to discontinue service, and thereby lose its capital investments, merely upon the extension of a federal loan to a neighboring rural water authority. There is no evidence that Congress intended such a result in enacting § 1926(b). The implication of the Tenth Circuit's interpretation of § 1926(b) raises Fifth Amendment Takings issues and Due Process concerns due to its retroactive effect on the municipalities and public boards.

If the applicants' position is accepted by this Court, the decision of the court below must be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 99-1081

TOWN OF MULDROW, AND THE
MULDROW PUBLIC WORKS AUTHORITY,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE ALABAMA WATER AND WASTEWATER INSTITUTE AND THE ALABAMA LEAGUE OF MUNICIPALITIES AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

The Alabama Water and Wastewater Institute (hereinafter "AWWI") and the Alabama League of Municipalities (hereinafter the "League") respectfully submits the following brief as *amici curiae* in support of the Petition for a Writ of Certiorari.*

* Consent of counsel for the petitioners herein has been obtained and filed with the clerk of this Court. However, counsel for the respondent has refused to consent to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* hereby certify that no counsel for either party has authored the brief, in whole or in part, and that no person or entity, other than the *amici curiae*, their members, or counsel, have made monetary contributions to the preparation or submission of this brief.

AWWI is a non-profit organization representing fourteen of the largest water producers in the State of Alabama. Its members are public corporations and municipal boards organized and existing pursuant to Acts of the Legislature of Alabama for the purpose of operating water and/or sanitary sewer facilities within the State of Alabama. Similarly, the League is a voluntary association representing approximately 435 cities and towns in the State of Alabama, a number of which operate water systems and sanitary sewer faciilties. The applicants, AWWI and the League, have an interest in this case in that there are over 700 rural water systems (hereinafter "rural water authorities") eligible for federal rural development loans in the State of Alabama and a substantial number have received loans from the Farmers Home Administration (hereinafter "FmHA") and its successor agency (the USDA Rural Utilities Service, PL 103-354). Consequently, these water associations enjoy the protection provided by 7 U.S.C. § 1926(b). Members of AWWI and the League routinely provide service to rural water customers to whom service would otherwise be unavailable and have a decided interest in protecting their investments in rural water development. If adopted by the United States Court of Appeals for the Eleventh Circuit, the Tenth Circuit's decision in this case could cause members of AWWI and the League to forfeit substantial amounts of infrastructure and other capital investments and would deter future rural water development by municipalities and other public bodies.

In support of the petitioners herein, the AWWI and the League propose that the Tenth Circuit's broad interpretation of § 1926(b) protection raises legitimate constitutional questions. Under the Tenth Circuit's construction, a municipality or other public body lawfully supplying water to rural customers could be forced to discontinue service, and thereby lose its capital investments, merely upon the extension of a federal loan to a neigh-

boring rural water authority. Such a result will greatly impact water services provided to rural customers.

STATEMENT OF THE CASE

Although the facts of this case have been fully set forth in the briefs and opinions below, the following facts bear restating for purposes of this brief. The Petitioner, Town of Muldrow (hereinafter "Muldrow"), owns and operates a water plant and distribution system within its corporate boundaries. *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1194 (10th Cir. 1999). The Respondent, Sequoyah County Rural Water District No. 7 (hereinafter "Sequoyah"), is a rural water district incorporated to develop and provide water service to rural residents within its territory. *Id.*

As a rural water association, Sequoyah and its predecessors have obtained loans from the Farmers Home Administration (hereinafter "FmHA") on four occasions. *Sequoyah,* 191 F.3d at 1194-95. The first period of indebtedness began in 1969 with the first of three notes and ended in 1989 when Sequoyah satisfied all of its FmHA loans in full. *Id.* The second period of indebtedness began on September 28, 1994 when Sequoyah obtained a fourth FmHA loan. *Id.* After Sequoyah paid off its first series of loans but before it became indebted to the FmHA in 1994, Muldrow began providing water service to rural customers and continued to provide service to these customers after Sequoyah obtained the 1994 loan. *Id.* Sequoyah claimed that Muldrow violated 7 U.S.C. § 1926(b) by continuing to provide water service to customers within contested service area, after Sequoyah obtained the 1994 loan.[1]

---

[1] 7 U.S.C. § 1926(b) protects FmHA loans by providing, in pertinent part, that service "made available" by FmHA indebted associations ". . . shall not be curtailed or limited . . . during the term of such loan; . . ."

The district court granted Muldrow's Motion for Summary Judgment, holding that the protection of § 1926(b) did not apply because Sequoyah had not "made service available" to the contested water customers. *Sequoyah,* 191 F.3d at 1196. On appeal, the United States Court of Appeals for the Tenth Circuit (hereinafter "Tenth Circuit") in reversing the district court's decision and remanding the case based upon perceived issues of fact, held that water services previously provided by Muldrow and continuing during the term of Sequoyah's 1994 loan are actionable even though Muldrow first initiated water service to the disputed customers prior to Sequoyah's indebtedness. According to the Tenth Circuit, Sequoyah "may recover for encroachments occurring *or continuing after* . . . the date on which it obtained [the 1994] loan from the FmHA, so long as it establishes that it made service available to those customers." *Id.* at 1206. Because the retroactive application of § 1926(b) promulgated by the Tenth Circuit prohibits a municipality from continuing to use its property, *amici curiae* file this brief in support of the petitioner to raise to this Court the constitutional implications of this decision.

SUMMARY OF ARGUMENT

This Court has articulated clear canons of construction which must be followed in the construction and application of a statute. Fundamentally imbedded in those canons of construction are the principles that a court should construe a statute so as to comply with its plain meaning and, perhaps more importantly, to avoid giving rise to any constitutional issues created by the construction. *See Rust v. Sullivan,* 500 U.S. 173 (1991); *see also Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568 (1988); *St. Martin Evangelical Church v. South Dakota,* 451 U.S. 772 (1981); *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979); *Machinists v. Street,* 367 U.S. 740 (1961). The

Tenth Circuit has articulated a construction of the statute at issue, 7 U.S.C. § 1926(b), which does not comply with these fundamental canons of construction. If accepted, the holding of the Tenth Circuit propagates a statutory scheme whereby a municipality or other public body lawfully supplying water to rural customers may be forced to abandon its property and service to customers, merely upon the extension of a federal loan to a rural water authority, without any notice or compensation to the municipality. Such an interpretation raises issues concerning a violation of the Takings Clause of the Fifth Amendment, as well as, Due Process. *See Eastern Enterprises v. Apfel, et al.*, 524 U.S. 498 (1998); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). Moreover, such a construction is not necessary to give meaning to the statute and to comply with congressional intent. Accordingly, the holding of the Tenth Circuit, expanding the reach of § 1926(b) beyond constitutional limitations, should be reversed.

ARGUMENT

This Court is presented with the age-old question of the construction and application of a federal statute. Although proper statutory construction is a fundamental duty of the judicial system, a mere request to articulate general guidelines regarding a statute generally would not provide sufficient basis for granting a Writ of Certiorari. However, where a statute is construed and applied in a manner that goes beyond its plain meaning and, more significantly, gives rise to constitutional considerations, it is incumbent on this Court that the issues raised be addressed to insure that the application of the statute is in full compliance with the Constitution.

The matter before this Court concerns the construction and application of 7 U.S.C. § 1926(b).[2] Section 1926(b)

[2] All references to § 1926(b) shall be to 7 U.S.C. § 1926(b).

provides rural water associations, during the term of a FmHA loan, certain protections from actions by municipalities and public boards, which curtail the services made available by the rural water association. The statute at issue reads:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b).

Heretofore, the courts considering § 1926(b) have generally recognized that to receive the protection provided by § 1926(b) a water association must (1) have a current obligation to FmHA and (2) have provided or made available services to the area in dispute. *See Lexington-South Elkhorn Water Dist. v. City of Wilmore, Kentucky*, 93 F.3d 230 (6th Cir. 1996); *North Alamo Water Supply Corp. v. City of San Juan, Texas*, 90 F.3d 910, 914 (5th Cir. 1996); *CSL Utilities, Inc. v. Jennings Water, Inc.*, 16 F.3d 130 (7th Cir. 1993); *Jennings Water, Inc. v. City of North Vernon, Indiana*, 895 F.2d 311, 315 (7th Cir. 1989). Despite this general recognition, the courts have differed regarding the standard for determining whether services have been made available by the rural water association. Nevertheless, the courts have only applied the protections and prohibitions of § 1926(b) to actions

taken after the protection of § 1926(b) attached. The Tenth Circuit, through its decision in this case, now recognizes and expands § 1926(b) to prohibit an otherwise lawful activity upon the happening of a specific event, which is outside of the control of the acting party. *Sequoyah,* 191 F.3d at 1206.

The Tenth Circuit would, without any recitation to congressional intent for such a construction or other concurring authority, apply the limitations created by § 1926(b) to require the abandonment of lawfully originated water services, and all rights, duties and obligations associated therewith, of a municipality in favor of a rural water association, which subsequently obtains a FmHA loan and attempts to claim § 1926(b) protection. Such a construction fails for a number of reasons. First, it is contrary to the plain language of the statute. Second, if allowed to stand, such an interpretation of the statute deprives municipalities of their right to Due Process and violates the Takings Clause of the Fifth Amendment because it effectively terminates pre-existing property rights without any notice, hearing, or compensation for the value lost. Until this Court articulates the reach and scope of the protections to be afforded by § 1926(b), other courts will continue to grasp at the limitations created by the statute and, if the Tenth Circuit's interpretation is accepted, subject municipalities and public bodies to an unjust taking of property rights. A statement is needed from this Court to establish conclusively the proper scope of and limitations on the protections created by § 1926(b).

It is well-settled that statutes should be construed to avoid constitutional questions. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo,* 485 U.S.

at 575 (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979)). "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). "When the validity of an act of Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 465-466 (1989) (citing *Cromwell v. Benson*, 285 U.S. 22, 62 (1932)). As this Court recognized in *Public Citizen*, a court should be "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." *Id.* at 466. "This canon is followed out of respect for Congress, which we assume legislates in light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

Despite such strong admonitions from this Court that the construction and application of a statute should not raise constitutional issues, the Tenth Circuit has in fact implicated constitutional considerations without any showing of congressional intent to so do. The FmHA loan on which the Tenth Circuit relies to extend protection to Sequoyah, was funded on September 28, 1994. Prior to September 28, 1994, Muldrow began providing water services to a number of water customers that are the issue of this dispute. In order to provide such services, Muldrow invested time and capital expenditures to create water facilities and services which would meet the needs of the customers. At the time Muldrow made such an investment and began providing the services there was

nothing limiting its actions. Furthermore, Muldrow's actions were lawful under state and federal law. Subsequent to the establishment of the services by Muldrow, Sequoyah obtained a FmHA loan. Although the loan was obtained in 1994, Sequoyah did not challenge the continued service of these customers by Muldrow or seek relief pursuant to § 1926(b) until 1997. With respect to these pre-existing services the Tenth Circuit held that Sequoyah "may recover for encroachments occurring or continuing after September 28, 1994, the date on which it obtained another loan from FmHA, so long as it establishes that it made services available to those customers." *Sequoyah,* 191 F.3d at 1206. By construing § 1926(b) to retroactively extend to the continuation of pre-existing services during the term of the loan, the Tenth Circuit effectively declared that it was irrelevant that Muldrow had lawfully started providing services to the customers in dispute, that the services were provided at an expense to Muldrow, and that the customers depend upon Muldrow for the services provided. Under the Tenth Circuit's construction of § 1926(b), the simple occurrence of obtaining a federal loan can divest a municipality of its investments and prevent the municipality from continuing to provide service to its customers. This application of § 1926(b) thus has a retoractive effect on Muldrow as it applies to the services initiated prior to the loan and continuing thereafter.

The Takings Clause of the Fifth Amendment provides: ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has identified several factors which determine whether there has been a "taking": the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986) (citing *Penn Cen-*

tral Transportation Co. v. New York City, 438 U.S. 104 (1978)). Application of these three standards to the case at bar demonstrates that the construction of § 1926(b) in the manner advanced by the Tenth Circuit creates Takings Clause considerations. With respect to the economic impact of the regulation, prohibiting Muldrow from continuing services would render the pipes, the water plants, the easements and all other assets used in providing the services, of no benefit to the municipality because there would be no use to which the property could be made. The application of the statute interferes with the reasonable investment-backed expectation of the municipality because in order to provide the water services the municipality made significant capital investments in expectation of continuing to provide services so that it could recoup the cost of the investment through the provision of such services. Finally, the application of the § 1926(b) as propounded by the Tenth Circuit exceeds that which is necessary to effect congressional intent.

Similarly, Due Process is implicated by the proposed interpretation because of its retroactive application. As recognized by Justice Kennedy:

> If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

Eastern Enterprises v. Apfel, 524 U.S. 498, 548-49 (1998) (J. Kennedy concurring in result).

It is presumed that Congress was aware of the limitations on its action created by the Constitution and that it would act in accordance with those limitations. *Cf Debartolo*, 485 U.S. at 575 (stating that because Congress is bound by and swears an oath to uphold the Constitution, the courts will "not lightly assume that Congress intended to infringe constitutionally protected liberties. . . .") If Congress had intended to perpetuate a scheme whereby a property owner may be deprived of its property merely by the government extending a benefit, such as a loan, to another, it would have complied with the constitutional requirements and provided for compensation and the necessary due process. Congress did not do so. Furthermore, there is no evidence of congressional intent to effect such a result. The Tenth Circuit's opinion is noticeably lacking of any support for its holding. Faced with the constitutional issues created by the Tenth Circuit in the absence of congressional intent, it is incumbent on this Court to articulate a construction of § 1926(b), which would not raise such constitutional concerns.

In addition to the grave constitutional concerns raised by the holding of the Tenth Circuit, the *amici curiae* respectfully suggest that the Tenth Circuit's holding does not comply with the terms of the statute. As previously discussed, before a water association may even attempt to waive the shield of § 1926(b) as protection, the association must have a FmHA loan and must have made services available in the disputed area. 7 U.S.C. § 1926(b). However, the mere establishment of those two requirements does not end the analysis required by § 1926(b) to determine if it prohibits the challenged activities. Rather, § 1926(b) explicitly provides that it is only when the services of the rural water association

are curtailed or limited during the term of the loan that such actions are not acceptable under § 1926(b). Thus, assuming that the other conditions are met, it is only when a municipal corporation or other public body takes affirmative action during the term of the loan, such as running new water lines into the rural water association's service area, that its actions may be construed as violating § 1926(b). To have "curtailed or limited" the services of a rural water association, a municipal corporation would have to usurp, during the term of the loan, some service that the water association was providing. If a municipal corporation or public body provided certain services prior to the water association obtaining a § 1926(b) loan, and continued to provide the same services after the loan was obtained, it has not altered or affected the services which were offered by the rural water association at the time the loan was obtained or thereafter.

The Tenth Circuit went beyond the plain meaning of the statute to construct an interpretation which turns the protection of § 1926(b) into an aggressive instrument to be used by rural water associations to thwart legitimate competition. The Tenth Circuit would have this Court accept a construction of § 1926(b) which restricts the critical phrase of the statute—"during the term of the loan"—to a mere requirement that a rural water association obtain a FmHA loan to "force out" a competitor. There is no valid basis for such a restriction. Such a construction is troubling and the unjust ramifications of it are seen by its application to the case at hand.

Water service is one of the primary services provided by municipalities and municipal public boards. The effect of the Tenth Circuit decision, if left to stand, will be to stifle development of water services to rural customers by municipalities and public boards because of the threat that a rural water association could later obtain a FmHA

loan to destroy the municipalities' investment and service. Such a result was surely not intended by Congress.

The Tenth Circuit has enunciated a broad interpretation of § 1926(b) which requires a municipality or other public body lawfully supplying water to rural customers to discontinue service, and thereby lose its capital investments, merely upon the subsequent extension of a federal loan to a neighboring rural authority. The *amici curiae* respectfully suggest that such an interpretation raises legitimate Fifth Amendment Takings and Due Process concerns. Additionally, it is the position of the *amici curiae* that the Tenth Circuit has gone beyond the language of § 1926(b). All of these concerns may be avoided by the recognition of this Court that the protections and prohibitions of § 1926(b) only extend to actions taken by municipalities or public bodies after § 1926(b) protection has attached to a rural water authority, and not to the mere continuation of services already provided by the municipality or public body.

CONCLUSION

For the reasons set forth above, this Court should grant the Petition for a Writ of Certiorari, reverse the opinion of the United States Court of Appeals for the Tenth Circuit, and remand for entry of an opinion consistent with the opinion of this Court.

Respectfully submitted,

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No. 99-1081

IN THE
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TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) *prior to the time an allegedly encroaching association begins providing service* in order to be eligible for Section 1926(b) protection.

— U.S. Court of Appeals for the Sixth Circuit, in *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 237 (6th Cir. 1996) (emphasis added).

* * * *

If the water district has made service available *to a pre-existing customer of a municipality* and the customer is located within the water district service area after becoming indebted, the statute grants the indebted water district the exclusive right to sell water to that customer during the life of the loan.

— Sequoyah County Rural Water District No. 7, in its Response to Petition for Writ of Certiorari, at p. 11 (emphasis added).

* * * *

INTRODUCTION

A comparison of the passages quoted above demonstrates the significant distinction between the Sixth Circuit's interpretation of 7 U.S.C. § 1926(b) and the interpretation argued by Sequoyah County Rural Water District No. 7 ("Sequoyah"), the Respondent in this case. The distinction is subtle because it depends on the complexities of circuit-made case law interpreting Section 1926(b). The significance of the distinction lies in the potential for manipulation of local governance, abuse by rural water districts, and loss of control by state regulatory authorities. This significant

distinction demonstrates the split between the Sixth and Tenth Circuits on the interpretation of Section 1926(b). This significant distinction also demonstrates the substantial question of public importance that is before the Court on the standard for interpretation of Section 1926(b).

Under the Sixth Circuit's approach, the elements of a rural water district's Section 1926(b) protection must be met before the competing municipality "begins providing service," or there is no Section 1926(b) protection. *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 237 (6th Cir. 1996). The *Lexington-South Elkhorn* court applied this standard only to the location of water lines – the "made service available" element of Section 1926(b) protection – because that was the element that was at issue in that case. The Sixth Circuit gave no indication in its decision that this approach would be applied with any less weight or vigor to other elements of Section 1926(b) protection, such as the rural water district's status as an "association," and the existence of qualifying federal indebtedness.

Sequoyah's approach to this issue turns Section 1926(b) on its head. With Sequoyah's interpretation of Section 1926(b), rural water districts could displace municipalities as water-service providers in broad geographic areas, including areas within the municipalities' corporate boundaries. Sequoyah's approach allows this result by extending Section 1926(b) protection to cover geographic areas that are served by municipalities prior to the funding date of the rural water district's federal loan. Sequoyah's approach would allow an even broader application of Section 1926(b) by allowing rural water districts to meet the other elements of Section 1926(b) protection after municipalities initiate service to water customers. For example, a private corporation that does not qualify as an association for purposes of Section 1926(b) could apply for and receive federal funds, lay water lines near municipal water customers, then later convert its charter to form a rural water

district that would qualify for Section 1926(b) protection.[1] Sequoyah's interpretation of Section 1926(b) would also allow a qualifying rural water association to run a water distribution line through a neighboring municipality, claim that it had made service available to the entire municipality, and attempt to wrench control of the municipality's water-service system based on the anticompetitive protection of Section 1926(b).

Sequoyah's broad approach to interpretation of Section 1926(b) is driven by a desire to spread the statute's protection as far as possible, beyond the reach and capacity of Sequoyah's water lines and beyond the reasonable expectations of neighboring water providers. Sequoyah's desire to extend Section 1926(b) protection so broadly is based on the extortionate value of Section 1926(b) protection held by rural water districts.

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[1] A variation of this example that is highly dependent upon Iowa law can be found in the very recent decision of the U.S. Court of Appeals for the Eighth Circuit, in *Rural Water Sys. # 1 v. Sioux Center*, Nos. 98-4160, 99-2005, 2000 WL 62098 (8th Cir. Jan. 26, 2000) (slated for publication in the Federal Reporter). In *Sioux Center*, the Eighth Circuit quoted and relied on the liberal-interpretation standard found in the Tenth Circuit's decision in this case. *Id.*, slip op. at *3. The *Sioux Center* court used the Tenth Circuit's liberal-interpretation standard to support a strained interpretation of Iowa statutory law that admittedly involved "excising words" from the Iowa statute. *Id.* at *2.

The Eighth Circuit's decision in *Sioux Center* also adds support to Muldrow's argument, at page 27 of its Petition for Writ of Certiorari, that the interests supporting Section 1926(b) disappear when the protected debt is repaid. On page *3 of its decision in *Sioux Center*, the Eighth Circuit determined that a customer trade between a rural water district and a municipality, later challenged by the rural water district on Section 1926(b) grounds, was not rendered invalid by Section 1926(b). "Although the statute was enacted to protect the government's security, the government's security was not impaired by this trade." *Sioux Center*, 2000 WL 62098, at *3.

Sequoyah has never served the disputed customers.[2] Sequoyah owes no duty to serve the disputed customers. In fact, Sequoyah likely has no intention of ever serving the disputed customers. If Sequoyah is granted an exclusive right to serve the disputed customers, these customers would be forced to build additional water lines and facilities so that Sequoyah could provide water service. The result is economic waste: Muldrow already provides water service to the disputed customers, and has done so since before Sequoyah was indebted to the federal government. Sequoyah hopes that it can use federal-court judgments enforcing this economic waste to force Muldrow to buy Sequoyah's right to serve the disputed customers.

In considering Muldrow's Petition for Writ of Certiorari, and in determining the proper standard for interpretation of 7 U.S.C. § 1926(b), the Court should take note of the extreme positions taken by Sequoyah in its Response. Sequoyah's extreme positions have been adopted by the Tenth Circuit with its liberal-interpretation standard and retroactive application of Section 1926(b)'s anticompetitive protection of rural water districts. These extreme positions severely impede state governments in the regulation of local water service.

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[2] In its Response, Sequoyah argues that it served water to "some of the customers until Muldrow disconnected them from the Sequoyah-7 system and connected the customers to the Muldrow system." [Response, at p. 2.] This assertion is contrary to the District Court's finding that "Sequoyah-7 does not contend it has provided water service to the disputed territory in the past. Nor does it contend that it is currently providing such service." [Appendix B, at p. 48a.] In its appeal to the Tenth Circuit, Sequoyah failed to challenge the District Court's finding on this factual issue. Furthermore, the record before the Tenth Circuit offers no support for Sequoyah's position on this factual issue. More importantly, the record is clear in its support for the finding by both the District Court and the Tenth Circuit that Muldrow began serving a number of the disputed customers before the funding of Sequoyah's September 28, 1994 federal loan. [Appendix A, at p. 5a.] Sequoyah's factual statement does not contradict this finding.

ARGUMENT 1

The issue of whether 7 U.S.C. § 1926(b) should be construed narrowly or broadly was pressed and passed upon in the district court and the Tenth Circuit.

Sequoyah is incorrect in arguing that Muldrow has waived its argument that Section 1926(b) should be construed narrowly, in a manner consistent with the Constitution and other federal statutes. The Court's decisions have recognized the Court's power to consider pertinent arguments on federal claims that are properly presented. *Lebron v. National Rr. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Vance v. Terrazas*, 444 U.S. 252, 258 n.5, *reh'g denied*, 445 U.S. 920 (1980). The Court's "traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379 (internal quotations omitted; citations omitted).

Muldrow's position that the Tenth Circuit's interpretation of Section 1926(b) is inconsistent with congressional power and federal antitrust laws is not a new claim. At worst, Muldrow's argument on congressional power and federal antitrust laws is a new argument to support Muldrow's consistent claim: that Section 1926(b) should be construed narrowly to allow Muldrow to serve water to its current customers. Furthermore, the Tenth Circuit's interpretation of Section 1926(b) is based on a newly announced liberal-interpretation standard. As a result, any arguments against the new standard would by definition be new arguments.[3]

The standard for interpretation of Section 1926(b) is a question that was addressed by both the District Court and the

[3] Sequoyah offers no support for its suggestion that an argument or issue must be raised in a petition for rehearing or rehearing en banc at the circuit-court level in order to be raised in a petition for writ of certiorari. Petitions for rehearing on appeal are not jurisdictional requirements for requests for writs of certiorari from this Court.

Tenth Circuit. [Appendix A, at pp. 8a-10a; Appendix B, at p. 41a.] The Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see also Lebron*, 513 U.S. at 379. That "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41; *see also Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

This rule is sensible in this case because the Tenth Circuit has adopted a new rule of construction that will govern all future cases in its jurisdiction involving Section 1926(b). A court's resolution of an issue of law is fairly presented for review, whether or not it was pressed by a party. There can be no doubt that in this case, the Tenth Circuit has announced a new and broad standard of construction for Section 1926(b). If allowed to stand, the Tenth Circuit's new standard for construction of Section 1926(b) will bind courts in all Section 1926(b) litigation in the Tenth Circuit. Furthermore, an appropriate review of the Tenth Circuit's new standard for construction of Section 1926(b) necessarily entails an analysis of the constitutional limitations on interpretation of the statute, as well as possible conflicts between the new standard and federal antitrust laws.

The most significant flaw in Sequoyah's Response is its misunderstanding of Muldrow's position on the constitutionality of Section 1926(b). Sequoyah asserts that Muldrow has argued that Section 1926(b) is unconstitutional. In reality, Muldrow has argued in its Petition that the Tenth Circuit's interpretation of Section 1926(b) is erroneous because the interpretation is inconsistent with constitutional constraints on congressional power.

The Court has long applied the rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the

intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Allentown Mack Sales & Serv., Inc. v. National Labor Relations Bd.*, 118 S. Ct. 818, 833 (1998) (Rehnquist, C.J., concurring in part and dissenting in part) (relying on *Edward J. DeBartolo Corp.*). This rule "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

In reviewing the Tenth Circuit's new liberal-interpretation standard for Section 1926(b), the Court would be obliged to consider whether the Tenth Circuit's interpretation is consistent with the Spending Clause power with which Congress enacted Section 1926(b). The Court should assume that Congress did not intend to exceed the scope of its Spending Clause power. The Court should also assume that Congress did not intend to facilitate an unconstitutional taking of municipally-owned infrastructure by enacting Section 1926(b). For these reasons the Tenth Circuit's interpretation of Section 1926(b) raises serious constitutional problems. The more appropriate interpretation of Section 1926(b), urged by Muldrow in its Petition for Writ of Certiorari, would avoid these constitutional problems.

Furthermore, to the extent that it is necessary to determine congressional intent in interpreting Section 1926(b), the Court must consider federal case law requiring narrow construction of statutes that provide exceptions to federal antitrust laws. In interpreting federal statutes, the Court assumes that when it passes legislation, Congress is aware of existing law, including basic rules of statutory construction. *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 801 (1998); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Thus, the Court should assume that Congress was aware that an antitrust safe harbor such as Section 1926(b) would be construed narrowly, as required by this Court's

decisions, including *Jefferson County Pharmaceutical Assn. v. Abbott Labs.*, 460 U.S. 150, 159, *reh'g denied*, 460 U.S. 1105 (1983). The Court should assume that Congress intended Section 1926(b) to be interpreted in a manner consistent with such decisions.[4]

When the Court is presented with a claim that involves a federal statute, issues of statutory interpretation should never be outside the Court's reach. Sequoyah's argument to the contrary should be rejected.

ARGUMENT 2

By prohibiting Muldrow from continuing to serve its current water-service customers, the Tenth Circuit's interpretation of Section 1926(b) would effect a taking of both Muldrow's customers and its ability to use its infrastructure.

On pages 10 and 11 of its Response, Sequoyah argues that retroactive application of Section 1926(b) protection does not effect a taking of Muldrow's infrastructure because "[t]he infrastructure remains the property of Muldrow." [Response, at p. 10.] This argument demonstrates Sequoyah's narrow view of the interests at stake in this case, and the public interests at stake in Section 1926(b) litigation.

In addition to losing the use of its infrastructure, Muldrow would lose its established customers. Before Sequoyah received its September 28, 1994 loan, Muldrow had constructed water lines for the purpose of serving water customers that were not receiving water service from Sequoyah. [Appendix A, at pp. 4a-5a;

[4] Sequoyah's response to this issue includes a lengthy discourse on waiver of public rights. [Response, at pp. 7-9.] Sequoyah's argument on waiver of public rights is impertinent to Muldrow's argument that Section 1926(b) should be interpreted narrowly because it is an exception to federal antitrust laws.

Appendix B, at p. 48a.] At the time these water lines were constructed, Sequoyah had no Section 1926(b) protection against competition. [Appendix A, at p. 5a.] With the Tenth Circuit's decision in this case, the District Court could now determine that the disputed customers can no longer be served by Muldrow. With no customers to serve, the water lines constructed by Muldrow to serve the disputed customers would be rendered useless to Muldrow.

While some level of congressional involvement in the marketplace is within the constitutional powers of Congress, the Constitution does not allow unfettered congressional control of the market. Excessive congressional interference in the marketplace can implicate the Takings Clause. *See Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 684 (O'Connor, J., concurring in part and dissenting in part) (suggesting that congressional imposition of common-carrier-like obligations on cable operators may raise Takings Clause issues), *reh'g denied*, 512 U.S. 1278 (1994). The Court has held that the Government's seizure and direction of operation of a coal mine to prevent a national strike of coal miners constituted a taking. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). It has been suggested that injunctive relief apparently required by federal antitrust laws could constitute a permanent physical invasion that would be a per se taking under the Takings Clause. *See, e.g.*, Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1225 (1999).

While Congress has the power to regulate competition, that power should not extend to mandating the complete destruction of an existing relationship between a water provider and its customers, without providing a mechanism for compensation as required by the Takings Clause. Such a mandate would run afoul of the factors identified by the Court in *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978), for analysis of takings issues.

As explained above, the Court should assume that Congress knew the requirements of the Takings Clause and Court's approach

to takings analysis. The Court should assume that Congress did not intend to enact a statute that authorized a taking without a mechanism for compensation. For these reasons, the Tenth Circuit's interpretation of Section 1926(b) is incorrect.

CONCLUSION

Sequoyah is incorrect in its argument that Muldrow has waived its statutory-construction arguments. The interpretation of Section 1926(b), and the standard for its interpretation, have been "pressed and passed upon." Muldrow should not be limited to the precise arguments that it raised below on issues of statutory interpretation. More importantly, Sequoyah has failed to demonstrate that the Tenth Circuit's liberal interpretation of Section 1926(b) can be reconciled with federal antitrust laws and constitutional constraints on congressional power. The construction advanced by Muldrow in this case is more reasonable, more consistent with the text of the statute, and avoids the constitutional problems identified in the Petition for Writ of Certiorari.

/s/_____
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